Fordham Urban Law Journal

Volume 48
Number 5 *A Taxing War on Poverty: Opportunity Zones and The Promise of Investment and Economic Development*

Article 1

2021

Ogden Commons Case Study: A Comparative Look at the Low-Income Housing Tax Credit and Opportunity Zone Tax Incentive Programs

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OGDEN COMMONS CASE STUDY: A COMPARATIVE LOOK AT THE LOW-INCOME HOUSING TAX CREDIT AND OPPORTUNITY ZONE TAX INCENTIVE PROGRAMS

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[*] The Author is particularly grateful to Robert Rozen, Michelle Layser, and Brandon Weiss for extensive discussions and comments. Thank you to Sean Cheng, Shreya Patel, and Campbell Punnett for excellent research assistance.

INTRODUCTION

Ogden Commons is a case study of a mixed-use project in North Lawndale, Chicago, which because of the involvement of a committed Housing Authority and anchor institutions as well as other regulatory requirements, represents the intended use of the Opportunity Zone (OZ) tax incentive. Congress introduced this place-based tax incentive in the Tax Cut Jobs Act of 2017,[1] incorporating the Investing in Opportunity Act that Senator Cory Booker introduced with Senator Tim Scott in 2016.[2] The idea was to "create[] a powerful new tool for promoting lasting economic development in the places that need it most" and to "incentivize private investors to invest their inactive capital in high-impact projects in economically distressed communities."[3]

Specifically, the OZ tax incentive provides for favorable tax treatment of capital gains that are reinvested into qualified opportunity funds (QOFs),[4] certain corporations or partnerships that then invest in Qualified Opportunity Zone property.[5] Opportunity Zone property can be Qualified Opportunity Zone stock, Qualified Opportunity Zone business property, or a Qualified Opportunity Zone partnership interest.[6] Qualified Opportunity Zones were designated in each state by the Treasury Department after being nominated by the states' respective governors.[7] The governors were limited to selecting a maximum of 25% of the number of low-income communities, generally tracts with poverty rates of at least 20% or median family income less than 80% of the area median, within their state.[8]

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1. *See* Amendment of 1986 Code, Pub. L. No. 115-97, § 13823, 131 Stat. 2054, 2183 (2017).

2. *See* Investing in Opportunity Act, S. 2868, 114th Cong. (2016).

3. *The Promise of Opportunity Zones: Hearing on S. 2868 Before the J. Econ. Comm.*, 115th Cong. 35 (2018) (statement of Sen. Cory A. Booker) [hereinafter Booker testimony].

4. *See generally* I.R.C. § 1400Z-2. Specifically, a taxpayer who realizes a gain from a sale of property and reinvests that gain in a QOF within a designated timeframe may defer recognition of the gain. *See id.* §§ 1400Z-2(a)(1), (b)(1). Furthermore, if a taxpayer holds the QOF investment for at least ten years, the taxpayer may increase the basis to the fair market value at the date of sale. *See id.* § 1400Z-2(c).

5. *See id.* § 1400Z-2(d)(1). Specifically, the fund must hold at least 90% of its assets in such property. *See id.* § 1400Z-2(f).

6. *See id.* § 1400Z-2(d)(2)(A).

7. *See id.* § 1400Z-1(b)(1)(A).

8. *See id.* §§ 1400Z-1(c)(1), 45D(e)(1). Low-income communities are defined using poverty rates and median family income, as per the New Markets Tax Credit

There are currently 8,764 designated Opportunity Zones throughout the United States and its territories,[9] comprising approximately 12% of all U.S. census tracts.[10] The number of designated Opportunity Zones ranges from 14 in the Virgin Islands to 879 in California.[11] "One in four Opportunity Zones have a poverty rate over 40 percent, compared to" 6.7% census tracts nationwide.[12] Furthermore, the median family income in an Opportunity Zone is 37% below the state median.[13] Part I of this Article describes one such designated Opportunity Zone in North Lawndale, Chicago, census tract 8433.[14] With a poverty rate of 46%[15] and an unemployment rate of 15%,[16] this census tract represents the type of economically distressed community that Congress intended to assist with the OZ tax incentive.

To learn more about this community and the Ogden Commons project, a list of participants to interview was developed from reviewing press reports regarding the Ogden Commons project as

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program. *See The Promise of Opportunity Zones*, U.S. CONG. JOINT ECON. COMM. (Nov. 29, 2018), https://www.jec.senate.gov/public/index.cfm/republicans/2018/11/the-promise-of-opportunity-zones#_edn1 [https://perma.cc/Q8BL-3LZS].

9. *See* IRS Notice 2018-48, 2018-28 I.R.B. 9 (July 9, 2018).

10. *See* Patrick Kennedy & Harrison Wheeler, *Neighborhood-Level Investment from the U.S. Opportunity Zone Program: Early Evidence* (U.S. Cong. Joint Comm. on Tax'n, Working Paper, 2021), https://static1.squarespace.com/static/57a3c0fcd482e9189b09e101/t/607893b915858d7bd0d198ba/1618514881004/oz_kennedy_wheeler.pdf [https://perma.cc/4NBM-8BZ9]. "Census tracts are small spatial units of approximately 4,000 residents . . . ." *Id.* at 5. There are 73,057 census tracts in the United States. *See Tallies*, U.S. CENSUS BUREAU, https://www.census.gov/geographies/reference-files/time-series/geo/tallies.html [https://perma.cc/R3CC-65QL] (last visited Sept. 19, 2021).

11. *See generally Opportunity Zones by Location*, OPPORTUNITY ZONES DATABASE, https://opportunitydb.com/location/ [https://perma.cc/2LMD-AESR] (last visited Aug. 5, 2021).

12. DEP'T HOUS. & URB. DEV., IMPLEMENTATION PLAN FOR THE WHITE HOUSE OPPORTUNITY AND REVITALIZATION COUNCIL 4 (2019), https://www.hud.gov/sites/dfiles/Main/documents/WHORC-Implementation-Plan.pdf [https://perma.cc/9L3Q-S8MB].

13. *See id.*

14. *Census Tract 8433, Chicago, Illinois*, OPPORTUNITY ZONES DATABASE, https://opportunitydb.com/zones/17031843300/ [https://perma.cc/9SPQ-29AT] (last visited Aug. 23, 2021).

15. *See Survey on Poverty Status in the Past 12 Months by Sex by Age*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=%28B17001%29&g=1400000US17031843300&tid=ACSDT5Y2017.B17001&hidePreview=false (last visited Aug. 5, 2021) (noting the poverty rate is 45.90% for 2017).

16. *See American Community Survey on Employment Status*, U.S. CENSUS BUREAU (2017), https://data.census.gov/cedsci/table?q=employment&g=1400000US17031843300&tid=ACSST5Y2017.S2301&hidePreview=true (noting the unemployment rate is 15% for 2017).

well as reaching out to the Author's network of affordable housing contacts. In-depth telephone interviews with the participants were held from June 2020 through June 2021, with follow-up questions sent by email. The interview list was expanded using a snowball sampling method, where at the end of each interview, each interviewee was asked for introductions to other participants in the Ogden Commons project and recommendations of other experts.[17] Interviewees included developers, project sponsors, lawyers, investors, nonprofit agencies, community development institutions, city and state level officials' staff, and employees of the community's anchor institutions.

There are very few restrictions on the OZ tax incentive except for the prohibition of investment in certain "sin" businesses such as racetracks or liquor stores.[18] Investors can contribute funds of any amount and can pool their funds with multiple other investors.[19] The OZ tax incentive was designed to be flexible, but this lack of regulation is extraordinary. Typically, "federal programs targeting resources to disinvested communities have incorporated measures intended to ensure that residents have a voice in how resources are employed in their community."[20] For example, as explained in Part II, the low-income housing tax credit (LIHTC) program[21] requires the

17. *See* Sven Berg, *Snowball Sampling*, *in* ENCYCLOPEDIA OF STATISTICAL SCIENCE 525, 529 (Samuel Kotz et al. eds., 1982); *see also* Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. L.J. 631, 642 (1994).

18. The "sin" businesses that QOFs are prohibited from investing in or leasing to include a golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or liquor store. *See* I.R.C. § 144(c)(6)(B); *see also* 26 C.F.R. § 1.1400Z-2(d)(3)(A)(iii); 85 Fed. Reg. 1,866, 1,929–30 (Jan. 13, 2020).

19. Reid S. Vardell, Note, *The Land of Opportunity Zones: Deferring Taxable Capital Gains Through Investments in Low-Income Communities*, 84 MO. L. REV. 915, 927 (2019).

20. BRETT THEODOS ET AL., URB. INST., AN EARLY ASSESSMENT OF OPPORTUNITY ZONES FOR EQUITABLE DEVELOPMENT PROJECTS: NINE OBSERVATIONS ON THE USE OF THE INCENTIVE TO DATE 11 (2020) [hereinafter THEODOS ET AL., EARLY ASSESSMENT], https://www.urban.org/sites/default/files/publication/102348/early-assessment-of-ozs-for-equitable-development-projects_0.pdf [https://perma.cc/83DJ-2FQV] (observing that the Empowerment Zones program that included "tax incentives for business expansion, required cities to prepare 10-year strategic revitalization plans in consultation with the community. The Community Development Block Grant program requires cities to prepare" plans that seek "participation by residents of low- and moderate-income neighborhoods").

21. The LIHTC provides for a tax credit equal to the "applicable percentage" of the qualified basis of each qualified low-income building. *See* I.R.C. §§ 42(a)–(b). The tax credit functions as a supply-side subsidy for affordable housing and is the largest federal subsidy for affordable housing production. *See* Tracy A. Kaye,

state's housing finance agency (HFA) to develop a qualified allocation plan that prioritizes certain types of projects over others,[22] based on input from the public.[23]

Also as described in Part II, the developer, The Habitat Company, is using both qualified opportunity funds and low-income housing tax credits to finance the different phases of the Ogden Commons project, and OZ funding for the initial commercial building phase and LIHTCs for the subsequent residential phases of the project. This unique feature of the Ogden Commons project allows for comparing and contrasting these very different tax incentives in Part III. This comparison was the subject matter of the *Fordham Urban Law Journal's* Symposium panel entitled *A Comparative Lens: Analyzing Place-Based Initiatives*, where this case study was first presented.

After discussing community impact and engagement in Part IV, this Article concludes by observing based on this and other case studies, that community engagement and community benefit only arise when a project's other funding sources require it or when anchor institutions, particularly nonprofit organizations, are involved in the project. This is not satisfactory, as community engagement is necessary for the success of the OZ tax incentive program. A letter signed by the Presidents' Council on Impact Investing[24] summarizes this sentiment:

> [S]uccess will require clear opportunities for community engagement to ensure local context and priorities are front-and-center in every Opportunity Zone. Indeed, success hinges on the extent to which Opportunity Zones enable current residents to engage and equitably participate in defining how new investments ultimately reshape and strengthen the physical, social and economic fabric of their communities.[25]

Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit, 38 VILL. L. REV. 871, 878 (1993).

22. *See* I.R.C. § 42(m).

23. *See, e.g.*, Ed Gramlich, *Qualified Allocation Plan*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/sites/default/files/2014AG-259.pdf [https://perma.cc/D8NC-F8BV] (last visited June 1, 2021).

24. The Presidents' Council on Impact Investing includes the heads of 19 leading U.S. foundations, holding greater than $80 billion in combined assets, that share a commitment to social impact investing. *See Our Partners*, U.S. IMPACT INVESTING ALL., http://impinvalliance.org/partners [https://perma.cc/ZM7T-ETDS] (last visited Sept. 19, 2021).

25. The U.S. Impact Investing All., *Government and Investors Seek to Lift Opportunity Zones, but Communities Will Define Success*, PR NEWSWIRE (June 25, 2019, 8:00 AM), https://www.prnewswire.com/news-releases/government-and-

Thus, requirements for community engagement and benefit must be made explicit as part of OZ reform legislation. One proposal previously put forward involves competitively awarding grants to certified Community Development Financial Institutions (CDFIs) and qualified nonprofit housing organizations to partner with QOFs on an affordable housing project or a mixed-use project such as the Ogden Commons project.[26] CDFIs have a long history of working and engaging with low-income communities.[27] Other scholars' proposals mentioned in Part IV should also be considered, but under no circumstance should this tax incentive be continued without serious reforms. Unfortunately, the legislation currently proposed in Congress is focusing predominantly on reporting requirements to assess the impact of designation as an Opportunity Zone rather than mandating community engagement or community impact.[28]

I. THE OGDEN COMMONS PROJECT

A. North Lawndale Neighborhood, Chicago

Understanding the Ogden Commons project requires situating it in the context of the larger North Lawndale community located on Chicago's West Side. A predominantly Black community[29] with a

investors-seek-to-lift-opportunity-zones-but-communities-will-define-success-300873922.html [https://perma.cc/Z7ZN-JMVJ].

26. *See* Michelle D. Layser et al., *Mitigating Housing Instability During a Pandemic*, 99 OR. L. REV. 445, 513–14 (2021); *see also infra* notes 216–18 and accompanying text.

27. THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 35 (noting that CDFIs "have a long track record of making substantial investments in low-income communities").

28. *See, e.g.*, Improving and Reinstating the Monitoring, Prevention, Accountability, Certification, and Transparency Provisions of Opportunity Zones (IMPACT Act), S. 2994, 116th Cong. (2019) (expanding reporting requirements and impact tracking for OZ's across the country); S. 1344, 116th Cong. (2019) (requiring Treasury to collect data and issue a report on the OZ tax incentives). *But see* Community Development in Opportunity Zones Act of 2020, H.R. 7262, 116th Cong. (2020) (allowing qualified opportunity funds to invest in community development financial institutions); *see also* Opportunity Zone Reporting and Reform Act, S. 2787, 116th Cong. (2019) (imposing certain use restrictions on OZ incentives such as requiring housing projects to incorporate certain rent and income limits in addition to requiring the reporting of the impact of a designated opportunity zone in relation to jobs, business, housing costs, and income distribution).

29. *See* N. LAWNDALE CMTY. COORDINATING COUNCIL, NORTH LAWNDALE: THE NEXT CHAPTER 1 (2018) [hereinafter QUALITY-OF-LIFE PLAN 2018], https://nlcccplanning.org/home-3/north-lawndale-the-next-chapter-quality-of-life-plan/ [https://perma.cc/GK27-XC4X] ("This is a primarily African-American

median household income of $28,327 (less than half that of the city of Chicago),[30] that has seen a 19% decrease in population since 2000,[31] it is exactly the type of community that Opportunity Zone investment is supposed to target. Racially discriminatory real estate practices since the 1960s led to disinvestment such that "[t]he population is about a third of where it was at the height, and storefronts and homes have been demolished or abandoned."[32] In 1960, North Lawndale had over 125,000 residents, whereas by 2018 the population had shrunk to approximately 35,000.[33] With a high unemployment rate of 15.9%,[34] a high percentage of renters[35] almost half of whom are housing cost burdened,[36] and only 14% of the residents having attained a bachelor's degree or higher,[37] this neighborhood is suffering.

Nevertheless, this community has a lot to offer.[38] There are "beautiful greystones and other historic buildings, wide boulevards and the 218-acre Douglas Park."[39] North Lawndale is close to transportation, downtown Chicago, and the University of Illinois at

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community, and it has been since the 1960s, when families relocated to North Lawndale during the Great Migration.").

30. *See* CHI. METRO. AGENCY FOR PLAN., NORTH LAWNDALE: COMMUNITY DATA SNAPSHOT CHICAGO COMMUNITY AREA SERIES JUNE 2021 RELEASE 3, 5 (2021) [hereinafter CMTY. DATA SNAPSHOT: NORTH LAWNDALE], https://www.cmap.illinois.gov/documents/10180/126764/North+Lawndale.pdf [https://perma.cc/6VS4-W6MC] (in 2018 dollars). These snapshots are "a series of data profiles for every county, municipality, and Chicago Community Area" that "primarily feature data from the [2014–2018] American Community Survey (ACS) five-year estimates, although other data" comes from multiple sources "includ[ing] the U.S. Census Bureau, Illinois Environmental Protection Agency (IEPA), Illinois Department of Employment Security (IDES), Illinois Department of Revenue (IDR) . . . and [the Chicago Metropolitan Agency for Planning] itself." *Id.* at 2.

31. *See id.* at 3.

32. QUALITY-OF-LIFE PLAN 2018, *supra* note 29, at 1 ("Several of our schools have been shuttered, and too many families live in poverty or are affected by violence and crime.").

33. *See id.* at 3.

34. *See* CMTY. DATA SNAPSHOT: NORTH LAWNDALE, *supra* note 30, at 9.

35. *See id.* at 6 (76% with 11,075 occupied housing units, 8,350 of which are renter-occupied).

36. *See American Community Survey Tenure by Housing Costs as a Percentage of Income in the Past 12 Months*, U.S. CENSUS BUREAU (2017), https://data.census.gov/cedsci/table?q=B25106&g=1400000US17031843300&tid=ACSDT5Y2017.B25106&hidePreview=false.

37. *See* CMTY. DATA SNAPSHOT: NORTH LAWNDALE, *supra* note 30, at 4.

38. *See* QUALITY-OF-LIFE PLAN 2018, *supra* note 29, at 1 ("From a base for the northern civil rights movement to a hub of industry, North Lawndale is a culturally rich community area with unique architectural character and historic significance. We have a strong sense of community and an abundance of local leaders.").

39. *Id.*

Chicago.[40] It is part of the INVEST South/West, "a community improvement initiative under Mayor Lori E. Lightfoot to marshal the resources of multiple City departments, community organizations, and corporate and philanthropic partners toward 10 communities on Chicago's South and West Sides."[41]

The community is also home to two anchor institutions that made this redevelopment possible, the nonprofit Mount Sinai Hospital[42] and the Cinespace Film Production Studio.[43] As part of the Sinai Health System, Mount Sinai Hospital prides itself with "over a century caring for people living in the most underserved communities on Chicago's West and Southwest sides, many disproportionately affected by illness, poverty and other social challenges."[44] The 11-acre mixed-use development known as Ogden Commons resulted from a partnership of these anchor institutions, the Chicago Housing Authority, and a developer called The Habitat Company, as well as the involvement of PNC bank.[45]

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40. *See id.*

41. CITY OF CHI. DEP'T. OF HOUS., 2021 QUALIFIED ALLOCATION PLAN 18 (2021), https://www.chicago.gov/content/dam/city/depts/doh/qap/qap_2021/QAP_May_24_2021.pdf [https://perma.cc/6M5K-TGA3].

42. Mount Sinai Hospital (MSH) is a nonprofit hospital, part of the Sinai Health System, located on Chicago's West Side that "provides an array of medical, surgical, pharmaceutical, behavioral health, and diagnostic services. MSH is a level 1 trauma center and provides care to 44,000 emergency department and 2,400 trauma patients annually." SINAI URB. HEALTH INST. MOUNT SINAI HOSPITAL 2019 COMMUNITY HEALTH NEEDS ASSESSMENT 4 (2019) [hereinafter SINAI 2019 CHNA], https://www.sinaichicago.org/en/community-health-needs-assessments-chna-and-community-health-improvement-plan-chip/ [https://perma.cc/BKN5-6NMR] (last visited Aug. 23, 2021). "The SHS service area largely comprises communities of color that face historic disinvestment and marginalization, oftentimes due to racist policies and practices. This history has resulted in staggering differences in health between the communities we serve and our well-resourced neighbors." *Id.* at 1.

43. The Cinespace produces TV shows such as Chicago Med, Chicago Fire, and Empire. *See* CINESPACE CHI. FILM STUDIOS, https://www.chicagofilmstudios.com/about-us [https://perma.cc/UCE8-D7E2] (last visited Aug. 23, 2021); *see also* CINESPACE CHI. FILM STUDIOS, https://www.chicagofilmstudios.com/credits [https://perma.cc/H5LV-LYS3]. "As part of its proposal, Habitat is partnering with SHS and Cinespace, two leading stakeholders and property owners in the community." Minutes of the Regular Meeting of the Commissioners of the Chicago Housing Authority, Item 14 (June 20, 2017) (on file with author) [hereinafter CHA Minutes 2017].

44. Press Release, Sinai Health Sys., Sinai Health System Receives $7 Million From CARES Act for Ambulatory Surgery Center at Ogden Commons (June 18, 2020) [hereinafter SHS Press Release] (quoting Karen Teitelbaum, President and CEO of Sinai Health System).

45. *See* CHA Minutes 2017, *supra* note 43 (noting that "[t]he resolution for Item 14 approves the selection of The Habitat Company LLC, Sinai Health System (SHS) and Cinespace Chicago Film Studios (Cinespace) as the development team for the

B. OZ Census Tract 8433

The Ogden Commons project is located in OZ census tract 8433 in Cook County, Illinois, one of 181 Opportunity Zones in this county.[46] This census tract includes a high concentration of Black and Latinx residents,[47] a high poverty rate of about 46%,[48] and a high unemployment rate of 15%,[49] as well as a high percentage of renters who are housing cost burdened.[50] Exactly the type of statistics that

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redevelopment of Lawndale Complex and Ogden Courts East; and approves a Redevelopment Agreement for Lawndale Complex and Ogden Courts East"); *see also* Sibley Fleming, *Can Affordable Projects Fill the Gaps with OZ Funds?*, MULTI-HOUS. NEWS (Apr. 30, 2020), https://www.multihousingnews.com/post/can-affordable-projects-fill-the-gaps-with-oz-funds/ [https://perma.cc/6KRU-G6LK] ("The financing was executed through PNC Bank, which provided the first mortgage, as well as access to its large Opportunity Zone fund."). As an aside, in 1987 Judge Aspen appointed The Habitat Company, a private real estate firm, as the "receiver to take over the development of all new family public housing units" as part of the judgment in the landmark *Gautreaux* case, which alleged that the Chicago Housing Authority's site and tenant selection was racially discriminatory. William P. Wilen & Wendy L. Stasell, Gautreaux *and Chicago's Public Housing Crisis: The Conflict Between Achieving Integration and Providing Decent Housing for Very Low-Income African Americans*, 34 CLEARINGHOUSE REV. 117, 125 (2000).

46. *See List of Illinois Opportunity Zones & OZ Funds*, OPPORTUNITY ZONES DATABASE, https://opportunitydb.com/location/illinois/cook/ [https://perma.cc/9NMJ-5DMU] (last visited May 27, 2021); *see also Census Tract 8433, Chicago, Illinois*, *supra* note 14.

47. *See American Community Survey on Race*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=B02001&g=1400000US17031843300&tid=ACSDT5Y2017.B02001&hidePreview=false (last visited Sept. 19, 2021) (listing the minority population (non-white) is 64.93% and, of the 2,144 residents, 1,184 identify as Black).

48. *See American Community Survey on Poverty Status in the Past 12 Months by Sex by Age*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=%28B17001%29&g=1400000US17031843300&tid=ACSDT5Y2017.B17001&hidePreview=false (finding the poverty rate is 45.90% for 2017) (last visited Sept. 19, 2021).

49. *See American Community Survey on Employment Status*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=employment&g=1400000US17031843300&tid=ACSST5Y2017.S2301&hidePreview=false (last visited Sept. 19, 2021) (listing an unemployment rate of 15% for 2017).

50. *See American Community Survey on Tenure*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=B25003&g=1400000US17031843300&tid=ACSDT5Y2017.B25003&hidePreview=false (last visited Sept. 19, 2021) (finding approximately 75% of the units are renter occupied); *see also American Community Survey on Tenure by Housing Costs as a Percentage of Household Income in the Past 12 Months*, U.S. CENSUS BUREAU, , https://data.census.gov/cedsci/table?q=B25106&g=1400000US17031843300&tid=ACSDT5Y2017.B25106&hidePreview=false (last visited Sept. 19, 2021) (finding approximately 46% of these renters are housing cost burdened (rents greater than 30% of their income)).

demonstrate a need for investment in this census tract.[51] The median household income for this census tract was $47,829[52] and the per capita income was $14,140.[53] The median household income for this census tract was $50,486[54] and the per capita income was $18,222.[55] These statistics compare unfavorably to $62,843 median income and $34,103 per capita income across the United States in 2019 and $58,247 and $37,103 respectively in Chicago.[56]

On February 17, 2017, the Chicago Housing Authority issued an Opportunity Notice of Proposal for a mixed-use and mixed-income development of approximately six acres of land located at 1401 South Washtenaw, 2600 West Ogden Ave, and 1321 South Washtenaw.[57] A three-member team evaluated the five proposals received and recommended the Ogden Commons development proposal submitted by The Habitat Company LLC, Sinai Health System (SHS) and

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51. However, there is longstanding debate over the "tension between providing adequate housing for very low-income African Americans and the ideal of integrating them into white communities." Wilen & Stasell, *supra* note 45, at 117. Chicago is at the forefront of this debate with respect to the future development of three of its former public housing developments (Henry Horner, Cabrini-Green and ABLA). *See id.* at 118. This is evidenced by the entanglement of the *Horner*, *Cabrini*, and *ABLA* lawsuits with the desegregation case of *Gautreaux v. Chicago Public Housing Authority,* which places restrictions on public housing built in communities with substantial Black populations. *See id.* at 119, 123.

52. *See American Community Survey on Median Household Income in the Past 12 Months (In 2017 Inflation-Adjusted Dollars)*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=%28B19013%29&g=1400000US17031843300&tid=ACSDT5Y2017.B19013&hidePreview=false (last visited Sept. 19, 2021).

53. *See American Community Survey on Per Capita Income in the Past 12 Months (In 2017 Inflation-Adjusted Dollars)*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=%28B19301%29&g=1400000US17031843300&tid=ACSDT5Y2017.B19301&hidePreview=false (last visited Sept. 19, 2021).

54. *See American Community Survey on Median Household Income in the Past 12 Months (In 2019 Inflation-Adjusted Dollars)*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=%28B19013%29&g=0100000US_1400000US17031843300&tid=ACSDT5Y2019.B19013&hidePreview=true (last visited Sept. 19, 2021).

55. *See American Community Survey On Per Capita Income in the Past 12 Months (In 2019 Inflation-Adjusted Dollars)*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=%28B19301%29&g=0100000US_1400000US17031843300&tid=ACSDT5Y2019.B19301&hidePreview=true (last visited Sept. 19, 2021).

56. *See American Community Survey QuickFacts for Chicago City, Illinois*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/chicagocityillinois/INC110219#INC110219 [https://perma.cc/A5SZ-HY4Q] (last visited Aug. 23, 2021).

57. *See* Contract for Redevelopment of Ogden Courts East and Lawndale Complex 1 (Sept. 14, 2018) (on file with author) [hereinafter Redevelopment Contract].

Cinespace Chicago Film Studios.[58] The Chicago Housing Authority and Ogden Commons JV LLC, basically Habitat, Mount Sinai, and Cinespace, entered into a redevelopment agreement on September 14, 2018.[59] "Together, SHS and Cinespace are adding an additional 5.5 acres of adjacent land to the redevelopment target area."[60] So, by the very nature of this partnership, the community was involved in this redevelopment plan even though the OZ legislation requires no such community engagement.[61] The Chicago Housing Authority's proposal process also subjected the Ogden Commons development proposal to a competitive screening not required by the OZ tax incentive. Partnership with the Chicago Housing Authority triggered other obligations and mandated various approvals by the Department of Housing and Urban Development (HUD).[62]

Note that this development project was initiated even before the OZ tax incentive came into law.[63] The West Baltimore case study

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58. *See id.*; CHA Minutes 2017, *supra* note 43 ("RESOLUTION NO. 2017-CHA-73 WHEREAS, the Board of Commissioners has reviewed the Board Letter dated June 20, 2017 entitled 'Authorization to 1) Approve The Habitat Company LLC, Sinai Health System and Cinespace Chicago Film Studios as the development team for the redevelopment of Lawndale Complex and Ogden Courts East; 2) Negotiate and enter into a Redevelopment Agreement for Lawndale Complex and Ogden Courts East . . . .'").

59. *See* Redevelopment Contract, *supra* note 57, at 1 ("OGDEN COMMONS JV LLC, a Delaware limited liability company (the 'Developer') whose members are Habitat Ogden Commons LLC, . . . Lawndale Ogden Development LLC, . . . and Ogden Commons MSH LLX . . . ." The Habitat Company LLC, Mount Sinai Hospital Medical Center of Chicago, and Cinespace Chicago Film Studios LLC, "by and through its affiliate LAWNDALE REAL ESTATE, LLC, . . . have an ownership interest in the member entities of the Developer . . . .").

60. CHA minutes 2017, *supra* note 43. "Three acres are owned by SHS and 2.5-acre parcel of land owned by Cinespace. With the addition of privately held land to the east and west of the CHA site, Ogden Commons development proposal encompasses a total of 10.9 acres." *Id.*

61. *See* Redevelopment Contract, *supra* note 57, at 20.

> The Developer has worked and will continue to work with the [Chicago Housing] Authority to involve residents and resident organizations in the planning and redevelopment process for the Development. If requested by the Authority, the Developer shall provide quarterly updates on the redevelopment process and shall participate in meetings on the planning, development and construction process, giving careful consideration to residents' suggestions.

Id. at 15.

62. *See id.* at 8 ("The Developer, all of the Sponsors and the Authority agree to cooperate in good faith to obtain all necessary approvals from HUD.").

63. *See Opportunity Zones Frequently Asked Questions*, INTERNAL REVENUE SERV., https://www.irs.gov/credits-deductions/opportunity-zones-frequently-asked-questions#qoz-business [https://perma.cc/BP7S-ZD5P] (last visited June 10, 2021)

also noted that many projects were "well into the development process before incorporating OZ" funding.[64] Prior to construction, Ogden Commons was the site of two public housing projects, the Chicago Housing Authority's Ogden Courts and the Lawndale Complex public housing project, which were demolished in 2005 and 2000, respectively.[65] In November 2018, the Chicago Planning Commission approved this mixed-use redevelopment of the Chicago Housing Authority's site and private land.[66] There are plans for office and retail space as well as mixed-income housing.[67] As the President of The Habitat Co. asserted, "Not only will it bring the first new outpatient facilities to the area in more than 20 years, but the project will also add new restaurants, a bank, office space, and much-needed affordable housing — all while creating jobs and building the local economy."[68] Thus, the new commercial building will provide the community with additional health resources, a branch of Wintrust Bank, as well as a Steak 'n Shake franchise, Momentum Coffee, and Ja' Grill restaurant — all minority-owned.[69]

The top two floors are leased by the Mount Sinai Surgical & Ambulatory Care Center enabling the Sinai Health System to offer greater access to much needed outpatient surgical services[70]

(listing Question 3, which states, as an answer, "[t]he first set of QOZ designations, covering parts of 18 states, were designated on April 9, 2018").

64. Michael Snidal & Sandra Newman, Missed Opportunity: The West Baltimore Opportunity Zones Story 25 (Feb. 19, 2021) (unpublished manuscript), https://www.brookings.edu/wp-content/uploads/2021/01/Snidal-Newman-Brookings-Draft-Feb-19-2021.pdf [https://perma.cc/DX5L-XWAP].

65. *See Work Begins on Replacement for North Lawndale Public Housing*, CHI. ARCHITECT (Mar. 9, 2020), https://www.chicagoarchitecture.org/2020/03/09/work-begins-on-replacement-for-north-lawndale-public-housing/ [https://perma.cc/HT3W-FBSR] (a loss of approximately 327 units of housing); *see also* THE CHI. HOUS. AUTH., CHICAGO HOUSING AUTHORITY: MTW ANNUAL REPORT FY2001, https://www.hud.gov/sites/documents/CHAFY2001-ANNUAL-REPORT.PDF [https://perma.cc/8KP8-JWEX] (last visited Aug. 12, 2021).

66. *See* Redevelopment Contract, *supra* note 57, at 7.

67. *See id.*

68. Christine Serlin, *Mixed-Use Development Breaks Ground in Chicago Opportunity Zone*, AFFORDABLE HOUS. FIN. (Mar. 12, 2020), https://www.housingfinance.com/developments/mixed-use-development-breaks-ground-in-chicago-opportunity-zone_o [https://perma.cc/7XCM-8UMP] (quoting Matt Fiascone, President of The Habitat Co.).

69. *See* Jay Koziarz, *First Phase of Mixed-Use Ogden Commons Project Opens in North Lawndale,* URBANIZE CHI. (June 16, 2021, 2:31 PM), https://urbanize.city/chicago/post/first-phase-mixed-use-ogden-commons-project-opens-north-lawndale [https://perma.cc/8BZ7-LY85].

70. *See id.*; *see also* SHS Press Release, *supra* note 44.

determined from surveying the community.[71] The Sinai Health System also decided to expand the much-utilized dialysis program, "greatly needed due to the disproportionate burden of kidney disease in the community."[72] The COVID-19 pandemic has highlighted the health disparities in underserved communities such as North Lawndale.[73] The Mount Sinai Surgical & Ambulatory Care Center in the Ogden Commons project will help to address some of these health inequities.

The Ogden Commons Community Council (OCCC) was created with monthly meetings beginning July 29, 2020, to advise on plans for the Surgical & Ambulatory Care Center with respect to such issues as wrap around hospitality services (including possible valet parking service and transportation services) and the design of a comfortable and user-friendly space. The OCCC will also "engage the broader community to solicit their ideas and better understand their needs to enhance the patient and client experience."[74] The commercial building that houses the Surgical & Ambulatory Care Center is expected to open in late 2021.

The projected completion date of the entire Ogden Commons project is 2026.[75] The residential component will start construction

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71. The Patient Protection and Affordable Care Act of 2010 (ACA) requires tax-exempt hospitals to conduct a Community Health Needs Assessments (CHNA) and Community Health Improvement Plan (CHIP) every three years. *See Requirements for 501(c)(3) Hospitals Under the Affordable Care Act — Section 501(r)*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/charitable-organizations/requirements-for-501c3-hospitals-under-the-affordable-care-act-section-501r [https://perma.cc/VA9E-J773] (last visited Sept. 20, 2021). This CHNA is developed with community stakeholders and assesses the health of the communities served. *See Community Health Needs Assessment for Charitable Hospital Organizations — Section 501(r)(3)*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/community-health-needs-assessment-for-charitable-hospital-organizations-section-501r3 [https://perma.cc/D6HS-SF4V] (last visited Sept. 20, 2021).

72. SHS Press Release, *supra* note 44.

73. *Id.* COVID-19 patients in the communities served by Mount Sinai had mortality rates of 17% versus 4.5% in Chicago. *Id.*

74. Ogden Commons Community Council Mission Statement (on file with author) ("The primary goals of the Ogden Commons Community Council are . . . [t]o give guidance, feedback and input on key areas of the Ogden Commons project[,] . . . [t]o provide the voice of community residents and patients[,] . . . [t]o provide on-going feedback and recommendations to Sinai leaders overseeing the Ogden Commons project.").

75. *See* Press Release, City of Chi., Off. of the Mayor, Mayor Lightfoot Celebrates Accomplishments of Invest South/West on One Year Anniversary (Oct. 26, 2020) [hereinafter Invest South/West Press Release].

later in 2021.[76] The first residential phase is a 110 unit "building with community activity space and an exterior children's play area" that includes studios, one-bedroom, two-bedroom, and three-bedroom units.[77] Forty percent of the units will be set aside for those on the housing authority waiting list. Chicago Housing Authority project-based vouchers will allow targeting of tenants to "pay an income-based rent equal to the greater of 30% of the household's adjusted monthly income or 10% of actual gross monthly income, less a utility allowance."[78] Furthermore, 50% of the units will be set aside for tenants at or below 60% or 80% of current area median income (AMI) and the final 10% will be unrestricted.[79] The second phase will provide an additional 77 units in 2022.[80]

II. FINANCING OF THE OGDEN COMMONS PROJECT

A. Qualified Opportunity Funds

So how was this $200 million project financed? The commercial building phase of the project used OZ funds totaling $12.5 million from a qualified opportunity fund of PNC Bank as well as a $3 million

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76. *Updates*, OGDEN COMMONS, https://www.ogdencommonschicago.com/ [https://perma.cc/NEZ4-AW93] (last visited Sept. 22, 2021) ("Construction of the residential component will begin in the fall of 2021.").

77. *Tenant Selection Plan: Ogden Commons Chicago, Illinois*, CHI. HOUS. AUTH. [hereinafter *Tenant Selection Plan*], https://cha-assets.s3.us-east-2.amazonaws.com/s3fs-public/2021-05/1.%202020%20TSP%20Ogden%20Commons.pdf [https://perma.cc/9PGJ-J2BA] (last visited Aug. 23, 2021).

78. *Id.* at 10. "These vouchers come from the transfer of assistance subsidies from a public housing site transitioning through HUD's Rental Assistance Demonstration (RAD) program and called 'RAD PBV Units'." *Id.* at 1.

79. *See* Email from Jeff Head, Vice President of Dev., The Habitat Co. LLC, to author (May 4, 2021, 12:20 PM) (on file with author). Eighty-nine units are set aside for households with incomes no more than 60% of AMI and 11 units for households with incomes no more than 80% of AMI, "as established by the Low Income Housing Tax Credit Program rules and regulations for the appropriate household size." *Tenant Selection Plan*, *supra* note 77, at 10.

80. *See* KRISTIN FAUST, ILL. HOUS. DEV. AUTH., REPORT OF ACTIVITIES FOR FY2020 AND PROJECTED ACITVITIES FOR FY 2021 25 (Feb. 26, 2020) (on file with author) [hereinafter FY2020 GOVERNOR'S REPORT IHDA]; *see also* WICS/WRSP Staff, *Illinois Awards $29 Million in Tax Credits for Affordable Housing*, ABC 20 (May 21, 2021), https://newschannel20.com/news/local/illinois-awards-29-million-in-tax-credits-for-affordable-housing [https://perma.cc/P3GS-ASW9] ("Ogden Commons A-2: The Habitat Company will begin 'Phase II' of a mixed-use, mixed-income development in North Lawndale. The 77-unit new construction building is located near Mt. Sinai Hospital, Cinespace Film Studios.").

first mortgage from the bank.[81] The OZ tax incentives do not come with any requirements to benefit the community[82] even though it is clear that in order "to help distressed communities, there must be an affirmative effort for investments to reflect the needs of the residents within those communities."[83] The West Baltimore case study found that although the OZ tax incentive is "stimulating investment conversations . . . it is failing at oversight and community engagement and not changing development outcomes."[84]

The Ogden Commons developer, The Habitat Co., had a great deal of trouble attracting qualified Opportunity Zone funding because "mission-oriented projects struggle to compete for attention with higher return projects."[85] According to the West Baltimore study, "most OZ funds are seeking market rate returns on the same types of investments that other funds are making regardless of the OZ incentive."[86] An Urban Institute study found that "most developers and investors view OZ incentives as providing a relatively small boost to overall returns."[87] The West Baltimore study interviews and "reviews of project proformas indicate[d] that OZ's year-five and year-seven step-up basis advantages" were not considered valuable to investors.[88] The West Baltimore study also noted that the OZ investment funds were seeking internal rates of return (IRR) between 10–16%, while projects in Baltimore's distressed neighborhoods were generating IRRs no greater than 3–6%.[89] In brief, the tax incentive is too weak to entice investors into these severely distressed

81. Serlin, *supra* note 68.

82. *See* THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at V ("As OZ incentives are not structured to encourage resident or community engagement, mission-oriented projects struggle to compete for attention with higher-return projects — for which OZs provide much larger subsidies because of the design of the incentives.").

83. Layser et al., *supra* note 26, at 472–73. "Critics have also noted that incentives can be accessed without community input or any process of prioritization where local governments can ensure alignment with localized goals." THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 2.

84. Snidal & Newman, *supra* note 64, at 3.

85. THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 4. "[M]any mission-oriented actors are struggling to access capital. Many project sponsors are struggling to access the class of investors — wealthy individuals and corporations with capital gains — for whom the OZ incentives are tailored." *Id.*

86. Snidal & Newman, *supra* note 64, at 25.

87. THEODOS ET AL., *supra* note 20, at 4. "The OZ incentives have had mixed effects in terms of making projects work that would not otherwise happen." *Id.* at VI.

88. Snidal & Newman, *supra* note 64, at 26 (reporting that "[o]ne Baltimore developer described them as 'worthless'").

89. *See id.* at 25.

neighborhoods even with an anchor tenant like Mount Sinai Hospital.[90] Finally, The Habitat Co. reached out to PNC Bank. This is a mission-driven investment for the bank,[91] and the project helps it to satisfy its Community Reinvestment Act (CRA) requirements.[92]

The OZ money available for such projects is not enough to enable these projects to work financially without many additional sources of funding. The Urban Institute study confirmed that "mission-oriented projects succeed in using OZs when the capital stack also layered in significant other subsidy sources."[93] In the case of the Ogden Commons commercial building phase of the project, the City of Chicago awarded a $2.5 million Neighborhood Opportunity Fund grant for the developer to outfit the interior of the building for the two restaurants, Steak 'n Shake and Ja' Grill — both minority-owned businesses.[94] This funding required The Habitat Co. to have at least

90. *See* THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 4 ("[M]any mission-oriented projects yield below-market returns that most OZ investors appear unwilling to accept.").

91. *See* Serlin, *supra* note 68 ("'As the first to go to market with our Opportunity Zone Fund, we were able to work with the city of Chicago, the CHA, and Habitat to equitably reinvest in a project on Chicago's West Side, which will provide affordable community health care, small business growth, job creation, and other positive economic impact,' said Thurman 'Tony' Smith, PNC senior vice president and community development market manager in Chicago.").

92. "Under the CRA regulation in effect for OCC-supervised banks until October 1, 2020, loans, investments, or services in an opportunity zone transaction may be eligible for CRA consideration if they meet the definition of community development. Community development includes . . . community services targeted to LMI individuals . . . ." OFF. OF THE COMPTROLLER OF THE CURRENCY, COMMUNITY DEVELOPMENTS FACT SHEET: OPPORTUNITY ZONES (2020), https://www.occ.treas.gov/publications-and-resources/publications/community-affairs/community-developments-fact-sheets/cd-fact-sheet-opportunity-zones.pdf [https://perma.cc/F3HX-2B8S] (footnote omitted) (citing 12 C.F.R § 25.12(g) (2019) (national banks) and 12 C.F.R. § 195.12(g) (FSAs)).

93. THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 4 (stating "when a well-connected project sponsor was able to locate an investor willing to accept significantly below-market returns").

94. *See* Chi., Ill., Ordinance 02019-2578, Ordinance for Redevelopment Agreement with Ogden Washtenaw JV LLC. for grant and expenditure of Neighborhoods Opportunity Funds at 2632 W Ogden Ave, 2638 Ogden Ave and 2646 W Ogden Ave (2019); *see also* Press Release, Off. of the Mayor, City of Chi., Mayor Emanuel Announces Two Retail Tenants Coming to Ogden Commons (Mar. 15, 2019), https://www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2019/March/RetailOgdenCommons.pdf [https://perma.cc/JV45-MCW7] ("Two African-American-Owned Restaurants [Steak 'n Shake and Ja' Grill] will offer first sit-down restaurants . . . and help boost new commercial development in the community."). "'The City's Neighborhood Opportunity Fund and Mayor Lightfoot's transformative vision for North Lawndale has made it possible for me to bring my business to Ogden Commons,' said Melvin Buckley, owner/franchisee of the Ogden Commons Steak 'n Shake." Invest South/West Press Release, *supra* note 75.

26% Minority Business Enterprise and 6% Woman Business Enterprise participation for the project's direct and indirect costs of construction.[95] Furthermore, "[c]ity residents must perform 50% of al! [sic] construction hours."[96]

As part of the Chicago mayor's commitment to addressing healthcare deserts,[97] Mount Sinai's North Lawndale Surgical & Ambulatory Care Center was awarded $7 million from Community Development Block Grant money that became available as part of the CARES Act funding for the City of Chicago.[98] This funding also came with certain requirements that were intended to benefit the community residents.[99] So, the Ogden Commons case study as well as the other case studies discussed in this Article demonstrates that social-impact projects require multiple sources of funding (capital stacking). Fortunately, the other funding sources, whether federal, state, local, or philanthropic, are accompanied by rules requiring community benefits such as affordable housing, employment, or social services for the local residents.[100]

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95. Application of an Amendment to the Chicago Zoning Ordinance, City of Chi. (Aug. 31, 2020), https://www.chicago.gov/content/dam/city/depts/zlup/Planning_and_Policy/Agendas/cpc_materials/11_2020/Zoning%20Amendment%20Application%20-%20PD%201430%20Amendment.pdf [https://perma.cc/KUU3-F2DA] (attaching an ordinance to be amended, which holds that there must be a certain amount of minority-owned and women-owned businesses).

96. NOF Conditional Award Letter from David Reifman, Comm'r, Dep't of Plan. & Dev., to Jeff Head, Ogden Washtenaw JV LLC (Mar. 7, 2019).

97. *See* Invest South/West Press Release, *supra* note 75.

98. *See* SHS Press Release, *supra* note 44. "The funding allocation was approved by the City Council on June 17th." *Id.*

99. Kelly Bauer, *Auburn Gresham, North Lawndale Getting $11 Million For New Health Centers*, BLOCK CLUB (June 29, 2020, 4:07 PM CDT), https://blockclubchicago.org/2020/06/29/auburn-gresham-north-lawndale-getting-11-million-for-new-health-centers/ [https://perma.cc/47TP-QPRW] ("The center will be 30,000 square feet and will help Mount Sinai Health System provide health care on the West Side.").

100. *See* THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at VI. "Maryland offers enhancements to other state tax credit programs for qualified OZ businesses if they agree to provide the state with transaction-level reporting, and *additional enhancement for projects that have a community benefits agreement or community residents on their governing/advisory board* and provide a resolution/letter from their locality or county." *Id.* at 9 (emphasis added) (citing *Maryland Opportunity Zone Enhancement Credits*, MD. DEP'T COM., https://commerce.maryland.gov/fund/programs-for-businesses/opportunity-zone-enhancement-credits [https://perma.cc/D5F5-RWEN] (last visited Apr. 26, 2020)).

B. Low-Income Housing Tax Credit Program

The residential component of the project utilizes LIHTCs,[101] which do come with requirements about the affordability of the housing produced.[102] Since its inception, the LIHTC program has supported the construction or rehabilitation of over 3 million housing units.[103] Although a federal tax incentive, the program is predominately administered by the appropriate state HFA.[104] Most tax credit units are produced by for-profit developers who typically sell shares in the project, either through large public offerings or private placements and other partnership arrangements, to one or more outside investors.[105] Primarily, these investors are banks seeking to garner CRA points.[106] These investors then claim the tax credits over ten years.[107]

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101. The LIHTC was enacted as part of the 1986 Tax Reform Act, Pub. L. No. 99-514, and has been modified numerous times. *See generally* Kaye, *supra* note 21. *See also, e.g.*, Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §§ 3001-05, 122 Stat. 2654, 2878–85 (temporarily increasing the per capita allocation of LIHTCs by 10% for each state for 2008 and 2009). The ceiling was also increased by 12.5% for 2019, 2020, and 2021 over concern about a potential drop in demand for LIHTCs by corporate and financial institutional investors because of the reduction in the corporate tax rate by the Tax Cuts and Jobs Act of 2017. *See generally* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348.

102. *See* I.R.C. §§ 42(g)(l)–(2). See also *infra* notes 122–23 and text accompanying for more details on the mandated affordability of the housing.

103. *See* *LIHTC Database*, HUD USER, https://lihtc.huduser.gov/ [https://perma.cc/ZM63-DW3F] (last visited Feb. 22, 2021).

104. *See* MARK KEIGHTLEY, CONG. RSCH. SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 4 (2021).

105. *See* CONG. BUDGET OFF., FEDERAL HOUSING ASSISTANCE FOR LOW-INCOME HOUSEHOLDS 6 (2015), http://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50782-lowincomehousing.pdf [https://perma.cc/75Y7-9S8T].

106. *See* Cassandra Jones Havard, *The Community Reinvestment Act, Banks, and the Low Income Housing Tax Credit*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 415, 417–18 (2017). The CohnReznick study estimated that corporations invested "approximately $10 billion of capital to finance housing credit projects in 2012, and that approximately 85% of this capital came from the banking sector." COHNREZNICK LLP, THE COMMUNITY REINVESTMENT ACT AND ITS EFFECT ON HOUSING TAX CREDIT PRICING 10, https://ahic.org/images/downloads/Research_and_Education/the_community_reinvestment_act_and_its_effect_on_housing_tax.pdf [https://perma.cc/MVK8-72V8] (last visited June 11, 2021) (analyzing another CohnReznick's report that analyzed the Low-Income Housing Tax Credit Program at the program's 25th anniversary).

107. *See* I.R.C. § 42(f)(1). The low-income housing credit may be claimed annually, generally over a ten-year period, by an owner of a qualified residential rental project beginning with the taxable year in which the building is placed in service. *See id.*

A taxpayer's credit amount in any taxable year is computed by applying the appropriate credit percentage[108] to the proportion of the eligible basis in a qualified low-income building that is attributable to the low-income rental units.[109] The LIHTC statute originally specified that the Internal Revenue Service (IRS) would periodically reset the specified credit percentages to maintain the present value of the ten-year stream of tax credits at 70% or 30% of the qualified basis.[110] However, since 2008, Congress has specified that the minimum credit rate for the 70% present value credit should be at least 9%, regardless of prevailing interest rates.[111] Concerned when the credit percentage for tax-exempt financed or rehabilitation projects dropped to a historic low of 3.07% in 2020, the 2021 Consolidated Appropriations Act[112] fixed the rate for this tax credit at 4%, providing a 4% floor like the 9% floor that was previously established for the 70% present value credit.[113]

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108. *See id.* §§ 42(b)(1)(A)–(B); *see also* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3002, 122 Stat. 2654, 2879. This change was made permanent in 2016. Consolidated Appropriation Act, 2016, Pub. L. No. 114-113, § 131, 129 Stat. 2242, 3055 (2015) (codified as amended at I.R.C. § 42(b)(2)). Thus, in a low interest rate environment, the present value of the credits claimed over ten years will exceed 70% of the qualified basis. *See* I.R.C. § 42(b)(1)(B)(i).

109. *See* I.R.C. § 42(d)(3). The eligible basis of a new building is its adjusted basis, which includes construction costs and other costs for depreciable property attributable to the building. *Id.* The cost of land, market rate units, syndication and financing are not eligible for the credit. STAFF OF JOINT COMM. ON TAX'N, 99TH CONG., 2D SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 157 (Comm. Print 1987).

110. *See* I.R.C. §§ 42(b)(1)(A)–(B). The so-called 9% credit is generally awarded for new construction and is intended to deliver up to a 70% subsidy. KEIGHTLEY, *supra* note 104, at 1. These competitive awards "are drawn from a state's annual LIHTC allocation authority." *See id.* at 1 n.2. The so-called 4% credit is either used for rehabilitation projects or projects using "at least 50% in federally tax-exempt bond financing and is designed to deliver up to a 30% subsidy." *Id.* at 1. Developers are automatically awarded 4% tax credits for the qualified tax-exempt bond financed projects. *Id.* at 1 n.2. "These 4% tax credits are not drawn from a state's annual LIHTC allocation." *Id.* The 30% and 70% subsidy levels are computed as the present value of the 10-year stream of tax credits divided by the development's qualified basis (roughly the cost of construction excluding land). *Id.* at 1.

111. *See* Housing and Economic Recovery Act § 3002. This change was made permanent in 2016. Consolidated Appropriation Act, 2016 § 131, 129 Stat. at 3055 (codified as amended at I.R.C. § 42(b)(2)). Thus, in the current low interest rate environment, the present value of the credits claimed over ten years will exceed 70% of the qualified basis. *See* KEIGHTLEY, *supra* note 104, at 3.

112. *See* Pub. L. No. 116-260, 134 Stat. 1182 (2020).

113. *See id.* § 201, 134 Stat. 3056 (amending I.R.C. § 42(b) to provide that the applicable percentage shall not be less than 4% for 4% tax credit projects, which will increase the amount of tax credit equity that can be raised for such projects).

Projects financed with the proceeds of tax-exempt bonds subject to the state volume cap under Internal Revenue Code section 146 are not required to receive an allocation of credit authority from the appropriate state or local HFA.[114] If Housing Bonds finance at least 50% of an affordable housing development, the development is eligible to receive the 4% LIHTC.[115] Thus, for the initial phase of the Ogden Commons residential project that is financed using tax-exempt bonds, the project will be automatically awarded the 4% LIHTC.[116] However, the developers, like The Habitat Co., must apply to receive Housing Bond authority from the state.[117] Furthermore, the project must still satisfy the requirements for allocation of a housing credit under the qualified allocation plan applicable to the area where the project is located, in this case Illinois.[118] In addition, in Illinois, all projects planning to apply to the Illinois Housing Development Authority (IHDA) for an allocation of LIHTCs must first submit a Preliminary Project Assessment prior to submitting a full application.[119]

114. *See* I.R.C. § 42(h)(4); *see also* JOINT COMM. ON TAX'N, 99TH CONG., 2D SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 167 (Comm. Print 1987) (noting that exemption from the mandatory allocation requirement is provided for buildings financed with proceeds of tax-exempt bonds).

115. For example, in FY 2019, the Illinois Housing Development Authority in conjunction with tax-exempt bond deals allocated a total of $26,771,363 in 4% Federal Tax Credits, totaling approximately $221,520,521, and creating 2,878 units, 2,870 of which were designated for low-income residents. *See* FY2020 GOVERNOR'S REPORT IHDA, *supra* note 80, at 42–43.

116. Generally, any building eligible for the credit must receive an allocation of credit authority from the state or local housing credit agency where the qualifying low-income housing project is located. *See* I.R.C. § 42(h)(1).

117. The Treasury Department allocates private activity bond (PAB) authority to state governments based on population size. States can choose to allocate a portion of their PAB authority to issue multifamily Housing Bonds. *See generally* STEVEN MAGUIRE & JOSEPH S. HUGHES, CONG. RSCH. SERV., RL31457, PRIVATE ACTIVITY BONDS: AN INTRODUCTION 1 (2018). For example, the IHDA received 18 applications seeking $298,332,211 to construct 2,704 units of housing through its bond financing programs in FY 2019. During FY 2019, the Authority financed approximately $392,058,194 for first mortgage loans on 21 multi-family developments located in the State. *See* FY2020 GOVERNOR'S REPORT IHDA, *supra* note 80, at 9, 11.

118. *See* I.R.C. § 42(m)(1)(D); *see also id.* § 42(h)(1); ILL. HOUS. DEV. AUTH., 2020–2021 LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 15 (on file with author) [hereinafter ILLINOIS QAP].

119. *See Affordable Housing Tax Credit*, ILL. HOUS. DEV. AUTH., https://www.ihda.org/developers/tax-credits/ [https://perma.cc/83FF-NDJV] (last visited Aug. 12, 2021). "Applications for Tax Credits generated from tax-exempt bond financed projects shall be submitted pursuant to a competitive Tax Exempt Municipal Bond application funding round process. However, such projects must meet the same requirements as projects applying for Tax Credits from the Credit Ceiling. In addition, the same application is required for projects anticipating

Each state HFA's qualified allocation plan must include project selection criteria such as: housing need characteristics, project characteristics, sponsor characteristics, tenant populations with special housing needs, and public housing waiting lists as well as allocation preference for projects serving the lowest income tenants or obligated to serve qualified tenants for the longest periods.[120] Illinois has prioritized underserved populations, such as 1) "[l]ow-income households" — particularly those "households earning below 30% of Area Median Income[,]" 2) "[l]ow- and moderate- income persons unable to afford housing near work or transportation[,]" 3) "[l]ow-income people residing in communities with ongoing community revitalization efforts[,]" and 4) "[o]ther special needs populations, including people with criminal records and veterans experiencing or at risk of homelessness."[121]

The low-income housing credit is available only on rent-restricted units that are leased to qualifying low-income tenants.[122] Residential rental projects qualify for the tax credit only if 1) 20% or more of the units are occupied by individuals with incomes that are no more than 50% of area median income, as adjusted for family size, or 2) 40% or more of the units are occupied by individuals with incomes that are no more than 60% of area median income, as adjusted for family size.[123] The 2018 Consolidated Appropriations Act added a third income test option, the ability to average the incomes of tenants when applying the income restriction tests.[124] However, no tenant's income can exceed 80% of the area median income.[125] A qualified residential rental project must remain as rental property with a minimum number of rent-restricted units for at least 30 years.[126]

generating Tax Credits from tax-exempt bond financing as is required for projects applying for Tax Credits from the Credit Ceiling." CITY OF CHI. DEP'T. OF HOUS., 2019 LOW-INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 1, 4 (2019), https://www.chicago.gov/content/dam/city/depts/doh/qap/qap_2019/2019_qap_final.pdf [https://perma.cc/B9KS-FD2A].

120. *See* I.R.C. § 42(m)(1)(C).

121. ILLINOIS QAP, *supra* note 118, at 15–16.

122. *See* I.R.C. §§ 42(g)(l)–(2). Gross rent is restricted to 30% of the imputed income limitation, which is determined by assuming a family size equivalent to 1.5 times the number of bedrooms in the housing unit. *See id.* § 42(g)(2).

123. *See id.* § 42(g)(1).

124. Pub. L. No. 115-141, § 103, 132 Stat. 348, 1157 (amending I.R.C. § 42(g))

125. *See id.* § 102(a), 132 Stat. at 540–41.

126. *See* I.R.C. §§ 42(h)(6), (i)(1). The credit is recaptured with interest from all owners if the project fails to comply with the rent limits and set aside requirements during this compliance period or from any owner who sells his interest in the project.

The Habitat Co. applied for tax-exempt bond financing for the first phase of the residential portion of the project and for the 9% LIHTC for an additional 77 units, the second phase.[127] The Illinois Housing Authority Board members approved the 9% LIHTC for Phase II, Ogden Commons A-2, in April 2021.[128] The use of Chicago Housing Authority seller financing and a ground lease triggered further requirements regarding local hiring.[129] Thus, the residential portion of the Ogden Commons project is subject to many rules intended to benefit the community.

Current barriers to using qualified opportunity funds "for affordable housing include the law's emphasis on increasing property value to receive capital gains tax relief,"[130] the lack of any requirement that qualified opportunity funds adopt a social mission as part of the self-certification process,[131] and barriers to involving nonprofits in OZ transactions.[132] Developers are also unable to easily combine OZ funding with the LIHTCs for a variety of reasons.[133] Affordable housing projects do not generate the kind of return demanded by most OZ funds, given the limited cash flow during the 15-year compliance period.[134] In addition, LIHTC properties often

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See id. § 42(j). Under some conditions, however, an owner may terminate this commitment after 15 years. *See id.* §§ 42(h)(6)(E)–(I).

127. *See* FY2020 GOVERNOR'S REPORT IHDA, *supra* note 80, at 25; *see also* WICS/WRSP Staff, *supra* note 80.

128. *See* WICS/WRSP Staff, *supra* note 80.

129. Telephone Interview with Jeff Head, Vice President of Dev., The Habitat Co. LLC (Feb. 19, 2021) (on file with author).

130. Layser et al., *supra* note 26, at 473 (citing Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82 (2020)).

131. *See* Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82, 154 (2020).

132. *See* Layser et al., *supra* note 26, at 473; *see also* Michelle D. Layser, *Nonprofit Participation in Place-Based Tax Incentive Transactions*, 48 FORDHAM URB. L.J. (forthcoming Oct. 2021) [hereinafter Layser, *Nonprofit Participation*] ("The requirement that Opportunity Funds make equity investments presents a significant barrier to using Opportunity Funds to support the activities of tax-exempt nonprofit organizations.").

133. *See generally* Glenn A. Graff, *Issues and Opportunities When Combining Opportunity Zones and LIHTC*, NOVOGRADAC J. TAX CREDITS, Apr. 2019, https://www.att-law.com/wp-content/uploads/BLOG/Issues-and-Opportunities-When-Combining-Opportunity-Zones-and-LIHTC-article.pdf. [https://perma.cc/BL77-6P7G].

134. *See* Jeff Head, *Can Tax Credits and Opportunity Zones Be Combined? Yes But . . .*, NAT'L APARTMENT ASS'N (Dec. 2019), https://www.naahq.org/news-publications/units/december-2019/article/can-tax-credits-and-opportunity-zones-be-combined-yes- [https://perma.cc/7R3A-FGZX]. "A further challenge for mission-oriented projects is that the sponsors are seeking to support a community asset with a lifetime well beyond the 10-year time horizon of the OZ incentives. Given that an

depreciate by the end of the 15-year compliance period because of the additional 15 years of affordability and sales restrictions.[135] This neutralizes the OZ tax incentive of a basis step-up after holding the property for ten years.[136]

LIHTC investors are primarily banks that invest in part to comply with the CRA,[137] whereas most OZ investors are high-net-worth individuals looking to shelter capital gains with very different expectations.[138] For 2019, the average household income for OZ investors exceeded $1 million — "approximately ten times higher than the national average household income of $104,158."[139] "Typical LIHTC investors such as banks often lack significant capital gains,"[140] thus banks with qualified opportunity funds are unusual.[141] The Ogden Commons project benefitted from finding this mission-driven investor for the commercial portion of the project but found no such OZ investor for the residential portion of the project.

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illiquid investment over a 10-year horizon is already challenging for OZ investors, the type of investment many mission actors need and the OZ market's investment parameters are mismatched." THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 4.

135. *See* Graff, *supra* note 133, at 4.

136. *See id.* at 1, 3 (noting, however, that "Section 7701(g) can apply allowing the investor to step up its Year 15 QOF basis to at least the amount of the nonrecourse debt." This step-up "should allow the OZLIHTC investor to avoid some or all of the exit taxes that would otherwise be due").

137. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-66, LOW-INCOME HOUSING TAX CREDITS: AGENCIES IMPLEMENTED CHANGES ENACTED IN 2008, BUT PROJECT DATA COLLECTION COULD BE IMPROVED 10 (2012), https://www.gao.gov/assets/gao-13-66.pdf [https://perma.cc/QK7M-LXS3]; *see also* OFF. OF THE COMPTROLLER OF THE CURRENCY, LOW INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS (2014), https://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-insights/pub-insights-mar-2014.pdf [https://perma.cc/LS4U-YFTB].

138. The OZ tax incentive benefits wealthy individuals given that the top 1% of households have 69% of all reported capital gains. *See Capital Gains Go Overwhelmingly to Wealthy Families*, CTR. BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/capital-gains-go-overwhelmingly-to-wealthy-families [https://perma.cc/KB8N-29Z5] (last visited Sept. 21, 2021); s*ee also* Kennedy & Wheeler, *supra* note 10, at 19 (arguing that "the direct tax incidence of the OZ program is likely to benefit households in the 99th percentile of the national household income distribution").

139. Kennedy & Wheeler, *supra* note 10, at 19.

140. Graff, *supra* note 133, at 3.

141. "[A]pproximately 88% of the partners of higher-tier" qualified opportunity fund partnerships were individuals. Kennedy & Wheeler, *supra* note 10, at 19. Furthermore, 82% of the OZ funds' investment is concentrated in partnerships. *See id.* at 10.

III. COMPARISON OF THE LIHTC PROGRAM WITH THE OPPORTUNITY ZONE TAX INCENTIVE

A. Similarities Between the LIHTC Program and the Opportunity Zone Tax Incentive

There are several similarities between the LIHTC program and the Opportunity Zone tax incentive.[142] Both incorporate the concept of public-private partnerships that is incentivizing private investors to invest their capital respectively either in affordable rental housing or "in high-impact projects in economically distressed communities."[143] In addition, both the LIHTC program and the Opportunity Zone tax incentive have holding period requirements and require a certain amount of technical expertise to implement.

1. Holding Period Requirements

To accomplish this goal of incentivizing private investors, both tax incentive programs provide preferential tax treatment for the investments if the investor holds the investment for a specified period. The LIHTC program provides tax credits over a ten-year period for investments held for at least 15 years.[144] If an owner sells or transfers title while the property is still within its 15-year initial compliance period, this transfer generally requires the recapture of these tax credits.[145] "During such a recapture event, the owner loses any projected future" LIHTCs from the property and must also repay one-third of the LIHTCs previously claimed.[146]

The Opportunity Zone tax incentive provides for the deferral of an initial capital gains tax as well as a varying level of capital gains tax reductions dependent on holding the qualifying assets either five,

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142. For a discussion of the New Markets Tax Credit and its differences with the Opportunity Zone tax incentive, see Rebecca Lester, Cody Evans & Hanna Tian, *Opportunity Zones: An Analysis of the Policy's Implications*, 90 ST. TAX NOTES 221, 226–28 (2018), http://opportunityzones.stanford.edu/docs/OpportunityZones-AnalysisofPolicyImplications.pdf [https://perma.cc/8GWB-RM5T]; *see also* Layser, *Nonprofit Participation*, *supra* note 132 (manuscript at 4).

143. *See* Booker testimony, *supra* note 3, at 2.

144. See *infra* note 170 for description of the requirements.

145. COHNREZNICK LLP, HOUSING TAX CREDIT INVESTMENTS: INVESTMENT AND OPERATIONAL PERFORMANCE 36 (2018).

146. *Id.* (adding that "[a]dditional interest and penalties may apply, which may or may not be covered by a recapture guarantee backstopped by the guarantors of the transaction").

seven, or ten years.[147] For example, if the qualifying investment is held for at least five years, the taxpayer increases the basis by an amount equaling 10% of the amount of gain deferred, in effect getting to both defer and reduce the payment of taxes on the taxpayer's initial capital gains.[148] Furthermore, if a taxpayer holds the QOF investment for at least ten years, the taxpayer may increase the basis to the fair market value at the date of sale, in effect deferring payment of taxes on the initial capital gains and eliminating the taxes on the appreciation of the QOF investment.[149]

Thus, the amount of the tax benefit is relatively fixed for the LIHTC investor as the residual value is not an important consideration for many corporate investors. The investor's return is expected to be primarily derived from the tax benefits. The investor is "effectively purchasing a financial asset in the form of a stream of tax benefits (consisting of tax credits and passive losses associated with depreciation and mortgage interest deductions)."[150] The OZ investor's tax benefit, however, depends on the holding period and the future appreciation of the qualified assets.

2. Technical Expertise Requirements

The professionals involved in the Ogden Commons project talked about the difficulties of putting together financing with either OZ funds or LIHTCs.[151] As is common with these mission-driven projects, both sides of this project, the commercial building as well as the residential phases, needed to stack multiple sources of debt and equity in order to make the project work financially. LIHTCs have been around since 1986, so there is a more mature market and easier access to technical expertise. Technical advisors have noted that "the Credit moves through allocation, delivery, and monetization via a well-established, experienced, transparent, competitive, rapid-

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147. Specifically, a taxpayer who realizes a gain from a sale of property and reinvests that gain in a QOF within a designated time frame may defer recognition of the gain. *See* I.R.C. §§ 1400Z-2(a)(1), (b)(1); *see also* I.R.S. Notice 2021-10, https://www.irs.gov/pub/irs-drop/n-21-10.pdf [https://perma.cc/N5ZU-K3BY].

148. *See* I.R.C. § 1400Z-2(b)(2)(B)(iii). If the taxpayer holds the investment for at least seven years, the taxpayer further increases the basis by an amount equaling 5% of the amount of gain deferred. *See id.* § 1400Z-2(b)(2)(B)(iv). If the taxpayer holds the investment for at least ten years, the taxpayer gets to both defer payment of taxes on the taxpayer's initial capital gains and to eliminate the capital gains taxes on the QOF investment. *See id.* § 1400Z-2(c).

149. *See id.* § 1400Z-2I.

150. COHNREZNICK LLP, *supra* note 145, at 14.

151. *See, e.g.*, Telephone Interview with Jeff Head, *supra* note 129.

feedback marketplace."[152] This, of course, has resulted from the development of experienced stakeholders and infrastructure but still requires legal and other advisors to implement and comply with all the technical requirements.

Utilizing OZ funds also requires a certain level of technical expertise, and there are particular difficulties in attracting most private investment to below-market projects. Michael Snidal noted that the public housing authorities appeared to be largely unfamiliar with the OZ tax incentive when he presented his West Baltimore study at the Council of Large Public Housing Authorities' annual meeting in the fall of 2019.[153] Even with a foundation-funded OZ Czar in Baltimore, "community stakeholders and small developers fe[lt] there ha[d] been insufficient education and engagement at the neighborhood level."[154] The West Baltimore study concluded that the OZ tax incentive "is a sufficiently complicated economic development tool that requires federal funding for education and engagement."[155]

Foundations, nonprofit organizations, and federal, state, and local governments are closing the education gap. For example, in 2019, the Rockefeller Foundation and Smart Growth America launched the National Opportunity Zones Academy to assist selected cities to attract socially responsible investment.[156] These cities, which include Chicago, receive access to technical assistance, "socially responsible investors through curated introductory events," and shared best practices among the participating cities.[157] Like other cities and states, the City of Chicago has collected various resources and

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152. RECAPITALIZATION ADVISORS, INC., THE LOW INCOME HOUSING TAX CREDIT EFFECTIVENESS AND EFFICIENCY: A PRESENTATION OF THE ISSUES 4–5 (2002).

153. Snidal & Newman, *supra* note 64, at 31.

154. *Id.* at 45. The Abell foundation funded the Baltimore City's OZ coordinator position. *Id.* at 16.

155. *Id.* at 24.

156. *See* Press Release, The Rockefeller Found., The Rockefeller Foundation and Smart Growth America Launch National Opportunity Zones Academy (Sept. 17, 2019), https://www.rockefellerfoundation.org/news/rockefeller-foundation-smart-growth-america-launch-national-opportunity-zones-academy/ [https://perma.cc/ERF8-TZST] (announcing the initial selection of five cities "to participate in the Academy including Chicago, Greater Miami and the Beaches, Pittsburgh, Seattle, and Norfolk, VA.").

157. *Id.* ("SGA's technical assistance team and its LOCUS program will work directly with each participating city to create place-based, community-led approaches to developing sustainable growth and development strategies that help transform selected Opportunity Zones into economically-thriving and socially-inclusive, walkable neighborhoods.").

interactable maps on its public website for developers and investors to use to more easily navigate the Opportunity Zones and available projects.[158] In addition, the Chicago Community Loan Fund created the Chicagoland Opportunity Zones Consortium to connect investors and developers with projects and stakeholders in the Chicagoland areas.[159] The Urban Institute study observes that the OZ tax incentive is stimulating "the evolution of a new community development ecosystem, engaging both project developers and investors who have limited historical engagement in community development work."[160] Thus, the development of the needed technical expertise and the maturation of the OZ marketplace is happening.

B. Differences Between the LIHTC Program and the Opportunity Zone Tax Incentive

There are, however, substantial differences between the LIHTC program and the Opportunity Zone tax incentive. The main difference is that the LIHTC requires the provision of a particular good of value to the public (below-market housing), whereas the OZ tax incentive does not have any such requirement. No local jobs need to be created, no "community-based organizations or disadvantaged businesses supported, or any needed community assets — like affordable housing — constructed."[161] Furthermore, in contrast to the very minimal requirements for self-certifying as a qualified opportunity fund, there are very extensive requirements for obtaining an allocation of LIHTCs.

Second, the federal cost of the LIHTC program is capped, whereas the cost of the OZ tax incentive is only limited by the number of qualified investors, those with capital gains willing to invest such in qualified opportunity zone property.[162] Unlike the LIHTC, there is

158. *See Opportunity Zones*, CHI. (May 11, 2018), https://www.chicago.gov/city/en/depts/dcd/supp_info/opportunity-zones.html [https://perma.cc/EZ78-56HT].

159. *See Meet the Cities,* SMART GROWTH AM., https://smartgrowthamerica.org/program/national-opportunity-zones-academy/meet-the-cities/ [https://perma.cc/F3WZ-HQE7] (last visited June 18, 2021).

160. THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 4.

161. Brandon M. Weiss, *Opportunity Zones, 1031 Exchanges, and Universal Housing Vouchers*, 110 CALIF. L. REV. (forthcoming 2022).

162. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-30, OPPORTUNITY ZONES: IMPROVED OVERSIGHT NEEDED TO EVALUATE TAX EXPENDITURE PERFORMANCE 8–9 (2020),

no limit on "the total amount that can be deferred as a result of investing in Qualified Opportunity Funds" or on "how much federal revenue is reduced by" claiming the tax incentive.[163]

Finally, although in theory both the LIHTC and the OZ tax incentive programs are nationally available, a study by two University of California, Berkeley Economics graduate students, Patrick Kennedy and Harrison Wheeler, demonstrates that the OZ investment is highly spatially concentrated in approximately 30 states.[164] LIHTC affordable housing projects, on the other hand, can be found in every state.[165]

1. Administration of the LIHTC and OZ Programs

To qualify for the LIHTCs, a developer must submit a written application to the state HFA designated by each state to allocate the state's authorized credit allocation.[166] As previously described, this state HFA must have adopted a Qualified Allocation Plan (QAP) to guide its approval process that sets forth the selection criteria, the allocation process, and the compliance monitoring procedures.[167] This QAP must include a 10% set aside for nonprofit developers.[168] These plans are developed and revised through a "public process,

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https://www.gao.gov/assets/gao-21-30.pdf [https://perma.cc/G2PS-HX8S] (noting that the OZ tax incentive "has fewer limits on the types of projects that can be financed, and fewer fiscal controls to limit potential revenue losses").

163. *Id.* at 10.

164. *See* Kennedy & Wheeler, *supra* note 10, at 1, 3 (noting in the author's footnote that the "research embodies work undertaken for the staff of the Joint Committee on Taxation").

165. *See* *2021 Federal LIHTC Information by State*, NOVOGRADAC, https://www.novoco.com/resource-centers/affordable-housing-tax-credits/2021-federal-lihtc-information-state [https://perma.cc/DG7M-KA9H] (last visited Aug. 8, 2021) (indicating specific state-by-state allocation of credit).

166. As detailed in Section II.B, although projects financed with the private activity tax-exempt bonds do not need a separate allocation for the 4% LIHTC, the developer must have applied to the state housing financing agency for the bond authority.

167. *See* KEIGHTLEY, *supra* note 104, at 1 n.1, 4 ("Computed as the average estimated tax expenditure associated with the program between FY2020 and FY2024. This figure does not include revenue loss associated with the changes to the LIHTC program enacted by the Consolidated Appropriations Act, 2021, P.L. 116-260. These changes are estimated to reduce federal revenues by $6.7 billion between FY2021 and FY2030."). *See generally* STAFF OF JOINT COMM. ON TAX'N, 116TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024 27 (Comm. Print 2020); STAFF OF JOINT COMM. ON TAX'N, 116TH CONG., ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN RULES COMMITTEE PRINT 116-68, THE "CONSOLIDATED APPROPRIATIONS ACT, 2021" (Comm. Print 2020).

168. *See* I.R.C. § 42(h)(5).

allowing for input from the general public and local communities, as well as LIHTC stakeholders."[169]

If the developer's application for LIHTCs is approved through this competitive process, the developer has demonstrated that its project meets the state's need for affordable housing as defined in the state's QAP. The state HFA then funds the qualified project and provides the developer with the associated tax credits. The developer typically sells the tax credits to private investors either directly or through a syndicator to obtain the funding necessary for the project.[170]

In contrast, there is no requirement that the OZ investment benefit the community or that the public be consulted with respect to the project. As discussed previously, there are actual barriers to involving nonprofits in Opportunity Zone transactions.[171] Furthermore, administrative steps for qualification for qualified opportunity funds are minimal. Qualified opportunity funds must submit a Form 8996, *Qualified Opportunity Fund*, initially and annually, to the IRS to self-certify that the corporation or partnership is a QOF.[172] The form requires minimal information such as the name of the entity, identification number, census tracts, and the QOZ property that is directly owned or leased by the taxpayer.[173]

The Securities and Exchange Commission (SEC) treats investment interests in QOFs as securities, so funds must also register with the SEC unless they file for an exemption within 15 days of the first sale

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169. KEIGHTLEY, *supra* note 104, at 4.

170. Investors claim the LIHTC over a ten-year period once the housing is placed in service. However, the LIHTC projects must comply with the income and rent restrictions for 15 years otherwise the tax credits will be recaptured. I.R.C. §§ 42(i)(1), (j). The statute also imposes an extended low-income housing commitment of an additional 15 years that is subject to some exceptions. *See id.* § 42(h)(6); *see also* Kaye, *supra* note 21, at 878–80.

171. *See* Layser et al., *supra* note 26, at 473–74. *See generally* Layser, *Nonprofit Participation*, *supra* note 132.

172. *See Form 8996: Qualified Opportunity Fund*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-pdf/f8996.pdf [https://perma.cc/7JVU-VR9Y] (last visited Aug. 8, 2021) ("By checking this box, you certify that by the end of the taxpayer's first QOF year, the taxpayer's organizing documents include a statement of the entity's purpose of investing in QOZ property and a description of the trade or business(es) that the QOF is engaged in either directly or through a QOZ business.").

173. *See id.* The QOFs also use the form to report compliance with the 90% asset test "or to calculate a penalty if it fails to meet that test." U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-30, *supra* note 162, at 12.

of securities in an offering.[174] Investors in a QOF must file a Form 8997, *Initial and Annual Statement of Qualified Opportunity Fund (QOF) Investments*, to report ongoing investments, new investments, dispositions of Fund interests, and the corresponding gains deferred.[175]

2. Federal Cost of the LIHTC and OZ Programs

Each state is granted an amount of LIHTCs pursuant to a federally designated formula based on a state's population and other factors.[176] For 2021, this amount is the larger of approximately \$3.2 million or \$2.81 per capita for each state.[177] Funding for the LIHTC is capped and is expected to result in revenue foregone of on average \$10.9 billion annually.[178] The Joint Committee on Taxation's (JCT) revenue estimates assume that the tax credit will be predominantly used by corporations. "In most states, competition for LIHTC resources is fierce"[179] with a 3 to 1 ratio of submitted applications for the 9% tax credits to the credits the state has available to distribute.[180] Furthermore, any unused credit authority is placed in a national pool to be reallocated among the qualified states.[181] Because the LIHTC is a scarce resource, only a limited number of applications will be allocated credits.[182]

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174. *See* THE COUNCIL OF ECON. ADVISERS, THE IMPACT OF OPPORTUNITY ZONES: AN INITIAL ASSESSMENT 15 (2020). QOFs seeking an exemption can file Form D and provide information such as the amount sold in the offering. *Id.*

175. *Form 8997, Initial and Annual Statement of Qualified Opportunity Fund (QOF) Investments*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-pdf/f8997.pdf [https://perma.cc/R89N-4UVQ] (last visited Aug. 8, 2021).

176. *See 2021 Federal LIHTC Information by State*, *supra* note 165.

177. *See* Rev. Proc. 2020-45, 2020-27 I.R.B. 3. These numbers are adjusted for inflation. "These figures reflect a temporary increase in the amount of credits each state received as a result of the 2018 Consolidated Appropriations Act (P.L. 115-141). The increase is equal to 12.5% above what states would have received absent P.L. 115-141, and is in effect through 2021." KEIGHTLEY, *supra* note 104, at 4.

178. *See* STAFF OF JOINT COMM. ON TAX'N, 116TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024 27 (Comm. Print 2020).

179. Kirk McClure et al., *The LIHTC Program, Racially/Ethnically Concentrated Areas of Poverty, and High-Opportunity Neighborhoods*, 6 TEX. A&M J. PROP. L. 89, 110 (2020).

180. *See* COHNREZNICK LLP, *supra* note 145, at 10.

181. I.R.C. § 42(h)(3)(D); *see, e.g.*, Rev. Proc. 2020-42, 2020-41 I.R.B. 891 (showing the amount of unused housing credit carryovers allocated to 33 qualified states for 2020 from the national pool of unused credit authority).

182. *See generally* CORIANNE PAYTON SCALLY, AMANDA GOLD & NICOLE DUBOIS, URB. INST., THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES 4 (2018),

On the other hand, participation in the Opportunity Zones program is only limited by the necessity of the relevant taxpayers having capital gains that they are willing to reinvest in QOZ property. The final OZ treasury regulations expanded these opportunities for investors by not requiring the netting of gains from the sales of certain business assets like real estate or machinery and equipment with any losses from such assets.[183] Samantha Jacoby of the Center on Budget and Policy Priorities noted that the JCT estimates in 2019 were "*nearly double* what it estimated in 2018 for this tax break."[184] Although the JCT estimates this tax incentive as costing on average $1.6 billion per year,[185] it is very difficult to estimate the future cost of forgiving all capital gains tax on the unknown future appreciation of the OZ investments.[186] As discussed in the Introduction, investors who hold their investments for ten years are eligible to exclude any post-investment capital gains on their investment.[187]

3. Geographic Reach of the LIHTC and OZ Programs

Like the LIHTC program, the Opportunity Zone tax incentive is nationally available, but it is geographically limited to the 8,764

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https://www.urban.org/sites/default/files/publication/98758/lithc_how_it_works_and_who_it_serves_final_2.pdf [https://perma.cc/987Y-63Y2].

183. *See* Investing in Qualified Opportunity Zones, 85 F.R. 1866, 1869 (Jan. 13, 2020) (providing "that eligible gains that may be deferred pursuant to section 1400Z-2(a)(1)(A) and the section 1400Z-2 regulations include gains from the sale or exchange of property described in section 1231(b) . . . (qualified section 1231 gains), regardless of whether section 1231(a) . . . would determine those gains to be capital or ordinary in character").

184. Samantha Jacoby, *Final Opportunity Zone Rules Could Raise Tax Break's Cost*, CTR. BUDGET & POL'Y. PRIORITIES (Feb. 3, 2020, 2:00 PM), https://www.cbpp.org/blog/final-opportunity-zone-rules-could-raise-tax-breaks-cost [https://perma.cc/VVY2-FTN2] ("The final regulations' investor-friendly rule changes create the potential for opportunity zones' costs to go even higher than current estimates — with no guarantee that low-income areas, or their residents, will benefit."); *see also* STAFF OF JOINT COMM. ON TAX'N, 116TH CONG., ESTIMATES OF FED. TAX EXPENDITURES FOR FISCAL YEARS 2019-2023 24 (Comm. Print 2019) (estimating a cost of $13.7 billion for the years 2019–2022).

185. *See* STAFF OF JOINT COMM. ON TAX'N, 116TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2019–2023 30 (Comm. Print 2019).

186. *See* Lester et al., *supra* note 142, at 229 (noting that "[t]o the extent that there is a large and enthusiastic response to this incentive by investors, the costs of the forgone tax revenue because of reduced capital gains could be much higher"); *see also* Samantha Jacoby, *Potential Flaws of Opportunity Zones Loom, as Do Risks of Large-Scale Tax Avoidance*, CTR. BUDGET & POL'Y PRIORITIES (Jan. 11, 2019), https://www.cbpp.org/research/federal-tax/potential-flaws-of-opportunity-zones-loom-as-do-risks-of-large-scale-tax [https://perma.cc/3VHR-XST3].

187. *See* I.R.C. § 1400Z-2(c) (excluding all post-investment capital gains after ten years).

designated Opportunity Zones.[188] Governors were able to designate 25% of their eligible tracts as Opportunity Zones.[189] A census tract not meeting the definition of a low-income community was still eligible for OZ designation if the census tract bordered a designated low-income Opportunity Zone and the median family income was not in excess of 125% of that of the bordering, low-income community.[190] Two hundred thirty of the designated OZ census tracts are such contiguous tracts.[191] Although the states selected the Opportunity Zones, the federal nature of the tax incentive program "forces distressed communities to compete for investment with non-distressed communities both locally and nationally."[192] As the West Baltimore case study lamented, "if the playing field is West Baltimore against gentrifying Brooklyn or [downtown] Portland, West Baltimore isn't happening."[193]

In fact, evidence from the Kennedy-Wheeler study shows that most qualified opportunity funds are being invested in just 16% of the designated Opportunity Zones; 84% of the eligible census tracts received no investment in 2019.[194] Furthermore, most OZ investors are making equity and property investments in those designated census tracts "with relatively higher educational attainment, incomes, home values," and pre-existing income and population growth as well as "declining shares of elderly and non-white residents."[195] This

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188. BRETT THEODOS, BRADY MEIZELL & CARL HEDMAN, URB. INST., DID STATES MAXIMIZE THEIR OPPORTUNITY ZONE SELECTIONS?: ANALYSIS OF OPPORTUNITY ZONE DESIGNATIONS 1 (2018) [hereinafter THEODOS ET AL., DID STATES MAXIMIZE?], https://www.urban.org/sites/default/files/publication/98445/did_states_maximize_their_opportunity_zone_selections_7.pdf [https://perma.cc/6888-HZY7] ("April 20, 2018, was the final deadline for governors (and the mayor of the District of Columbia) to select which among the roughly 56 percent of eligible census tracts should be classified as Opportunity Zones.").

189. *See id.* ("[O]r at least 25 tracts in states with fewer than 100 qualified tracts . . . .").

190. *See* I.R.C. § 1400Z-1(e)(1).

191. *See* THEODOS ET AL., DID STATES MAXIMIZE?, *supra* note 188, at 1–2 (2.6% of all designated tracts).

192. Snidal & Newman, *supra* note 64, at 32–33.

193. *Id.* at 35 (quoting an interviewee who works in banking, fund management, or business).

194. *See* Kennedy & Wheeler, *supra* note 10, at 9–10 (observing $18.9 billion of aggregate OZ investments from electronic filers of IRS Form 8996 in tax year 2019). The preliminary data does not include paper filings, which account for an estimated $6 billion or 25% of OZ investments. *See id.* at 3.

195. *Id.* at 3–4. But keep in mind that OZ census tracts "are socioeconomically disadvantaged relative to eligible-but-not-chosen tracts . . . which are in turn

preliminary data appears to echo Professor Michelle Layser's study of the New Market Tax Credit (NMTC) showing that, in many cases, NMTC "subsidies have flowed disproportionately to eligible census tracts that exhibit signs of gentrification."[196] Layser's article predicted that gentrifying OZ census tracts may similarly draw tax-subsidized OZ investment away from other eligible Opportunity Zones.[197] The Kennedy-Wheeler study provides evidence to support that prediction.[198]

LIHTC properties located in difficult development areas or qualified census tracts are eligible to receive a "basis boost" as an incentive for developers to invest in more distressed areas. In these areas, the LIHTC can be claimed for 130% — instead of the normal 100% — of the project's eligible basis.[199] However, since 2008 the law has provided for a discretionary basis boost such that state HFAs may treat individual projects "as if" they were in difficult development areas if needed for financial feasibility.[200] Thus, state HFAs currently have "the ability to designate any building, regardless of location, as eligible for an enhanced credit" — up to 130% of the building's eligible basis.[201] Professor Blaine Saito has expressed concern that this bonus has "encourage[d] building in high poverty, high segregation, low intergenerationally mobile, low amenity areas like the qualified census tracts."[202] In fact, to address this issue, the Biden

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disadvantaged relative" to all U.S. census tracts. *See id.* at 8 tbl. 1 (analyzing 74,001 census tracts).

196. Michelle D. Layser, *Subsidizing Gentrification: A Spatial Analysis of Place-Based Tax Incentives*, 12 U.C. IRVINE L. REV. (forthcoming 2021) (manuscript at 50) [hereinafter Layser, *Subsidizing Gentrification*] ("reveal[ing] that, in most cities, NMTC project density [wa]s highest in eligible census tracts that had high vacancy rates, increasing rents, or both," using high vacancy rates and increasing rents as evidence of gentrification).

197. *See id.* (manuscript at 50). Layser explains that the results may even be worse with respect to the OZ tax incentive program as it lacks any competitive allocation process like the one used to administer the NMTC. Because the incentive is designed as capital gains relief such that it is most valuable to taxpayers whose assets have substantially appreciated, OZ investments are more likely to be profit-driven than NMTC investment. *Id.* (manuscript at 59).

198. *See* Kennedy & Wheeler, *supra* note 10, at 3.

199. *See* I.R.C. §§ 42(d)(5)(B)(i)–(iii).

200. *See id.* § 42(d)(5)(B)(v). This statute was amended by the Housing and Economic Recovery Act. *See* Pub. L. 110-289, § 3003(a), 122 Stat. 2654, 2880 (2008).

201. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-66, LOW-INCOME HOUSING TAX CREDITS: AGENCIES IMPLEMENTED CHANGES ENACTED IN 2008, BUT PROJECT DATA COLLECTION COULD BE IMPROVED 9 tbl. 2 (2012), https://www.gao.gov/assets/gao-13-66.pdf [https://perma.cc/QK7M-LXS3]; *see also* I.R.C. § 42(d)(5)(B)(v).

202. *See* Blaine G. Saito, *Collaborative Governance and the Low-Income Housing Tax Credit*, 39 VA. TAX REV. 451, 487 (2020).

Administration has proposed providing for a 50% basis boost for LIHTC developments in Census Tracts of Opportunity (CTO).[203] CTOs are defined as "a tract which is entirely in one or more [difficult development areas] or which has low poverty or other advantages."[204]

IV. COMMUNITY ENGAGEMENT AND COMMUNITY IMPACT

So, what has been the impact on the local community of the OZ investment? With respect to the Ogden Commons project, new construction jobs have been created and the developer has exceeded Chicago's minimums on local hiring preferences by utilizing more than 26% of minority business enterprises and more than 6% of women business enterprises.[205] The tenants of the new commercial building will create an estimated 150 jobs. The Mount Sinai Surgical & Ambulatory Care Center will provide greater access to outpatient surgical services and will expand their dialysis program as well as attempt to remedy some of the health disparities that have been highlighted by the COVID-19 pandemic.[206] The much-needed restaurants are all minority-owned and managed and the Wintrust Bank branch is also a valued resource for the community.[207] Note that 5.4% of U.S. residents, approximately 7.1 million households, do not have a bank account.[208]

For this OZ tax incentive to actually help economically distressed communities, there must be an intentional effort for the OZ investment to reflect the needs of the residents within these designated Opportunity Zones.[209] As previously outlined, these OZ tax incentives can be taken advantage of "without community input or any process of prioritization where local governments can ensure alignment with localized goals."[210] However, the residential phase of the Ogden Commons project will likely be successful because of the community benefit requirements of the LIHTC program including

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203. U.S. DEP'T OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2022 REVENUE PROPOSALS 25 (2021), https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf [https://perma.cc/4VLF-8MDB].

204. *Id.*

205. Telephone Interview with Jeff Head, *supra* note 129.

206. SHS Press Release, *supra* note 43.

207. *See* Serlin, *supra* note 68; Koziarz, *supra* note 69.

208. *How America Banks: Household Use of Banking and Financial Services*, FED. DEPOSIT INS. CORP. (Oct. 19, 2020), https://www.fdic.gov/analysis/household-survey/index.html [https://perma.cc/8DNX-92GW].

209. *See* Layser et al., *supra* note 26, at 513.

210. THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 2.

the requirement of a qualified allocation plan that reflects the housing needs of the relevant community. Furthermore, a typical 100-unit LIHTC property, in its first year, on average, provides $7.9 million in additional local income and supports 122 additional jobs.[211]

The commercial building of the Ogden Commons project is a success because of the multiple requirements from the other sources of funding that did necessitate community engagement. The partnership with a nonprofit hospital meant that the community's health needs had been assessed and that a plan to address those needs had been developed with community stakeholders.[212] The partnership with the Chicago Housing Authority also necessitated the involvement of residents and resident organizations in the planning, development, and construction process, requiring "careful consideration to residents' suggestions."[213]

In order to improve the respective neighborhoods, the OZ tax incentive must incorporate some type of procedure for screening projects and some type of approval process must be "required by an administering agency with expertise in the development of low-income communities."[214] As Professor Brandon Weiss has astutely stated "merely parking capital near poverty will not solve deeply entrenched social issues of poverty and racial inequity."[215] One such proposal advocates "competitively award[ing] grants to certified Community Development Financial Institutions (CDFIs) and qualified nonprofit housing organizations that partner with qualified opportunity funds to develop affordable housing."[216] The Treasury Department's CDFI Fund[217] "would allocate these grants through a

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211. *See* COHNREZNICK LLP, *supra* note 145, at 6 (noting that each year "the housing tax credit program finances the construction or rehabilitation of approximately 100,000 units of affordable housing that support roughly 96,000 jobs and generate $3.5 billion in tax revenue").

212. *See supra* note 71 (noting that the ACA of 2010 requires tax-exempt hospitals to conduct a CHNA and CHIP every three years); *see also* SINAI 2019 CHNA, *supra* note 42, at 18.

213. Redevelopment Contract, *supra* note 57, at 15.

214. *See* Layser et al., *supra* note 26, at 513.

215. Weiss, *supra* note 161 ("And it may in fact exacerbate the problem.").

216. Layser et al., *supra* note 26, at 513. Certified CDFIs are community lenders that serve low-income communities and often provide funding for affordable housing developments. *See CDFI Certification: Your Gateway to the CDFI Community*, CMTY. DEV. FIN. INST. FUND, https://www.cdfifund.gov/sites/cdfi/files/documents/cdfi_program_fact_sheet_certification_updatedjan2016.pdf [https://perma.cc/V9CP-JKPL] (last visited Sept. 21, 2021).

217. "The CDFI Fund was created for the purpose of promoting economic revitalization and community development through investment in and assistance to Community Development Financial Institutions (CDFIs)." *About Us*, CMTY. DEV.

competitive application process to certified CDFIs or qualified nonprofits with an affordable housing mission that are able to partner with a QOF on an affordable housing project" or a mixed-use project such as the Ogden Commons project.[218] This program could be structured very similarly to the CDFI Fund's Capital Magnet Fund that competitively "award[s] grants to finance affordable housing" programs in low-income communities nationwide.[219]

Other scholars have also suggested involving CDFIs in the OZ tax incentive.[220] For example, an Urban Institute study recommended redesigning the OZ incentive to "encourage equity investments in CDFIs who set up QOFs."[221] In addition, Professor Layser has identified several barriers that need to be overcome for nonprofits to successfully participate in Opportunity Zone deals.[222]

Partnering a QOF with a certified CDFI or qualified nonprofit would hopefully steer some of the estimated $75 billion of QOF equity into sorely needed community development projects in truly economically distressed Opportunity Zones in lieu of the luxury housing and hotel projects that have tainted the Opportunity Zone program's reputation.[223] Involving CDFIs or qualified nonprofits will increase the likelihood that these expenditures will support activities that are the most needed post-pandemic such as additional

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FIN. INST. FUND, https://www.cdfifund.gov/about/Pages/default.aspx [https://perma.cc/J8D5-HHGV].

218. Layser et al., *supra* note 26, at 513–14.

219. *Capital Magnet Fund*, CMTY. DEV. FIN. INST. FUND, https://www.cdfifund.gov/programs-training/Programs/cmf/Pages/default.aspx [https://perma.cc/FJ9K-JJUG] (last visited Sept. 21, 2021); *see also Capital Magnet Fund: Solutions for Affordable Housing in Low-Income Communities*, CMTY. DEV. FIN. INST. FUND (2020), [https://perma.cc/S8KP-VKPW].

220. CHARLES TANSEY & MICHAEL SWACK, UNIV. OF N.H., CARSEY SCH. OF PUB. POL'Y, THE POTENTIAL ROLE FOR CDFIS IN OPPORTUNITY ZONES (2019), https://scholars.unh.edu/cgi/viewcontent.cgi?article=1362&context=carsey [https://perma.cc/ZAL3-FQXH]; *see also* Layser et al., *supra* note 26, at 513–14 (outlining the role that CDFIs play with respect to the New Market Credits program); Snidal & Newman, *supra* note 64, at 32 (noting that "[a]ll study participants believed that CDFIs should be better integrated into and supported by OZ").

221. THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 36.

222. *See* Layser et al., *supra* note 26, at 473; *see also* Layser, *Nonprofit Participation*, *supra* note 132 (manuscript at 35–36) ("identif[ying] several barriers, including the requirement that Opportunity Funds make equity investment, the absence of monetization structures, and uncertainty about how the investments will be treated under the CRA").

223. COUNCIL OF ECON. ADVISERS, THE IMPACT OF OPPORTUNITY ZONES: AN INITIAL ASSESSMENT, 4 (2020) (estimating that qualified opportunity funds raised $75 billion in private capital by the end of 2019).

interventions to increase the supply of affordable housing and to address the challenges associated with vacant properties.[224] To ensure that the benefits of these interventions flow to neighborhood residents and not just the investors, the OZ reforms should also limit the subsidies to affordable housing development or economic development that will directly benefit community residents.[225]

CONCLUSION

News articles have reported that the OZ tax incentive is driving billions of investment profits into projects such as luxury apartments, hotels, student housing, and storage facilities.[226] Others criticize that OZ funding is flowing into projects already underway[227] or in "neighborhoods that were already gentrifying."[228] The West

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224. *See* Layser et al., *supra* note 26, at 467–68, 512.

225. *Id.* at 512–13. "[B]ecause opportunity zone investments are not required to demonstrate specific benefits to the local population, investors may select projects based solely on their financial return, with little local social impact." Lester et al., *supra* note 142, at 229.

226. *See, e.g.*, Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html [https://perma.cc/ZH6K-RT5V] (noting that OZ investors minimize risk by investing in high-end assets with little benefit going to the community); *see also* Mark A. Pinsky & Keith Mestrich, Opinion, *Opportunity Zones Are All Sizzle, Fizzle and the Abuse of Good Intentions*, MARKETWATCH (Nov. 22, 2019, 4:20 PM), https://www.marketwatch.com/story/opportunity-zones-are-all-sizzle-fizzle-and-the-abuse-of-good-intentions-2019-10-08 [https://perma.cc/4UYE-KY4P] ("The results to date show that the outcomes are more likely to be luxury apartments and sparse jobs, not affordable housing and employment opportunities."); Justin Elliott, Jeff Emthausen & Kyle Edwards, *A Trump Tax Break to Help the Poor Went to a Rich GOP Donor's Superyacht Marina*, PROPUBLICA (Nov. 14, 2019, 5:00 AM), https://www.propublica.org/article/superyacht-marina-west-palm-beach-opportunity-zone-trump-tax-break-to-help-the-poor-went-to-a-rich-gop-donor [https://perma.cc/ZQ5C-DCSV] (revealing how a major donor's appeal to Florida Governor Scott resulted in an OZ designation that included a marina owned by this donor).

227. *See* Alex Nitkin, *How a $2B Redevelopment Site in Chicago Landed in a Federal Opportunity Zone: A TRD Investigation*, REAL DEAL (May 1, 2019, 9:00 AM), https://therealdeal.com/chicago/2019/05/01/how-a-2b-redevelopment-site-in-chicago-landed-in-an-opportunity-zone-a-trd-investigation/ [https://perma.cc/VSC5-X8J5]. The West Baltimore "study participants expect future investments to follow the pattern of investments to date, supporting development that would have happened without OZ." Snidal & Newman, *supra* note 64, at 12.

228. Layser, *Subsidizing Gentrification*, *supra* note 196 (manuscript at 3 & n.6) ("[G]entrifying census tracts had a 19 percent chance of receiving Opportunity Zone designation."); *see also* Kelsi M. Borland, *Many Opportunity Zones Are Already Gentrified*, GLOBEST (Feb. 14, 2019, 4:00 AM),

Baltimore study observed that 65% of all the OZ capital flowing into Baltimore is concentrated "into one gentrified census tract, Port Covington, where a $5.5 billion project was already underway."[229] The evidence is mixed in terms of the OZ tax incentive "making projects work that would not otherwise happen" with some developers reporting "a decisive difference in allowing a project to go forward, while others were clear that their project would have proceeded with or without OZ equity."[230] Other studies have found that the lack of an upfront federal, state, or local government review process is facilitating abuse of this tax expenditure.[231]

Although the program was intended to be national in scope, the preliminary 2019 data confirm that distribution of the investment capital has been driven by market forces to just 16% of the designated Opportunity Zones, those that were already experiencing gentrification at the expense of the other 84% of the OZs that received no investment.[232] Furthermore, most OZ investment is concentrated in those tracts where population, educational attainment, incomes, and home values are increasing while the proportion of elderly and non-white residents is declining.[233] Reforms must be made to the OZ tax incentive to ensure that the types and locations of the projects are consistent with the goal of improving local economic conditions.

The U.S. Impact Investing Alliance and the Beeck Center for Social Impact and Innovation at Georgetown University have set forth guiding principles for Opportunity Zone investors in the hopes of "ensur[ing] positive economic and social outcomes for all Opportunity Zone communities."[234] The "Community Engagement"

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https://www.globest.com/2019/02/14/many-opportunity-zones-are-already-gentrified/ [https://perma.cc/DYM7-D9E9].

229. Snidal & Newman, *supra* note 64, at 11.

230. THEODOS ET AL., EARLY ASSESSMENT, *supra* note 20, at 4–5.

231. *See id.* at 2 (noting "that incentives can be accessed without community input or any process of prioritization where local governments can ensure alignment with localized goals"); *see also* Snidal & Newman, *supra* note 64, at 3 (observing that "[t]he policy's flexible guidelines also raise concerns about whether and how the OZ will spur capital investment in distressed neighborhoods"); Weiss, *supra* note 161 (comparing the OZ tax incentive to the Section 1031 real estate exchange gain recognition deferral provision, "first and foremost, they are simply tax shelters").

232. *See* Kennedy & Wheeler, *supra* note 10, at 3, 9 (observing $18.9 billion of aggregate OZ investments from electronic filers of IRS Form 8996 in tax year 2019 that comprises 75% of the investment for that year).

233. *See id.* at 3–4.

234. THE WHITE HOUSE OPPORTUNITY & REVITALIZATION COUNCIL, OPPORTUNITY ZONES BEST PRACTICES REPORT TO THE PRESIDENT 8 (2020) ("This

principle requires that Opportunity Fund "managers integrate the needs of local communities into the formation and implementation of the funds, reaching low-income and underinvested communities with attention to diversity."[235] However, these principles are voluntary and the structure of the OZ tax incentive encourages contrary results.

Given that the largest tax benefit comes from investing in property that is most likely to garner future appreciation, OZ investment gravitates toward commercial real estate investments in the least risky neighborhoods. Those who take the least risk or get lucky are the most rewarded.[236] The possibility of community benefit must not be left to chance. It must be an intentional part of the OZ tax incentive tool, especially given the magnitude of the taxpayer revenue foregone and the incidence of the tax benefit on the wealthy. It is not appropriate for tax expenditures to be funding investments that do not benefit the residents of those Opportunity Zones.

This Ogden Commons case study has demonstrated the benefit of community engagement that came about because of the involvement of a nonprofit organization and other mission-driven investors. It does not appear that the OZ tax incentives are a strong enough incentive alone for mission-driven projects. Social impact projects like Ogden Commons require many layers of subsidy. This project only worked due to the investment by anchor institutions such as Mount Sinai Hospital, the City of Chicago, the Chicago Housing Authority, and the state of Illinois as well as a CRA-motivated investor such as PNC Bank. The OZ tax incentive was helpful with respect to the commercial real estate phase of the Ogden Commons project, financing over 50% of the commercial building. However, OZ funding played no role in the affordable housing phases of the project. Instead, the developers are relying on tax-exempt financing,

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framework has been voluntarily adopted by various Qualified Opportunity Funds."); *see also Inclusive Community Impact Investing*, BEECK CTR. FOR SOC. IMPACT & INNOVATION, https://beeckcenter.georgetown.edu/project/inclusive-impact-investing-opportunity-zones/ [https://perma.cc/H3MH-K74A] (last visited Sept. 22, 2021).

235. U.S. IMPACT INVESTING ALL. ET AL., *Prioritizing and Achieving Impact in Opportunity Zones* 2, https://static1.squarespace.com/static/5c5484d70b77bd4a9a0e8c34/t/5d1144358bc6b10001a5af3f/1561412661497/Opportunity+Zones+Reporting+Framework+-+June+2019.pdf [https://perma.cc/ZHC6-SZ4S].

236. Layser, *Nonprofit Participation*, *supra* note 132 (manuscript at 27) ("[I]t is worth noting that a successful project that generates post-investment gains, compounded over ten years, could provide taxpayers with tax-free returns that eclipse the tax savings associated with the initial deferral. Taxpayers who anticipate significant profits from an investment may find this third benefit particularly attractive . . . . As a result, the Opportunity Zones law provides the strongest incentive package to taxpayers who plan to pursue highly profitable projects.").

4% as well as 9% LIHTCs, and other Illinois-specific grants and tax incentives.

This Article also advocates for the involvement of CDFIs in this place-based tool to help distressed communities. The Ogden Commons case study and Professor Layser's Essay have respectively demonstrated the benefits and the necessity of involving nonprofit organizations. The entire Opportunity Zone tool must be reexamined to determine precisely what result is intended with this major investment of taxpayer dollars. Reforms to the structural design of the OZ tool are necessary to ensure that this investment pays off.